Supreme Court, U.S.
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No. 06-192

In The

Supreme Court of the United States

RODNEY HARRELL,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI OF PETITIONER RODNEY HARRELL

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QUESTIONS PRESENTED

1. Whether the United States Postal Service may rely upon return-to-work rules in a valid collective bargaining agreement to impose medical information requirements on employees returning from Family and Medical Leave Act leave that are more burdensome than the mere certification of fitness requirement permitted by § 2614(a)(4) of the Act.

2. Whether the union's passive incorporation by reference of the employer's unilateral return-to-duty requirements is a clear and unmistakable waiver of postal employees' statutory right to be reinstated to employment without having to provide additional personal health information.

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The opinion of the United States District Court for the Central District of Illinois (Pet. App. 69 to 82) granting in part and denying in part the motion for summary judgment of the United States Postal Service, dated July 25, 2003, in Case No. 02-2056 is unpublished.[1]

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 35 to 65) unanimously affirming in part and reversing and remanding in part the judgment of the district court, dated, July 19, 2005, is reported at 415 F.3d 700.

The order of the United States Court of Appeals for the Seventh Circuit (Pet. App. 67) granting the Petition for Rehearing of the United States Postal Service and vacating the Court's prior opinion, dated November 1, 2005, in Appeal No. 03-4204 is unpublished.

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1 to 34) unanimously affirming the judgment of the district court, dated May 4, 2006, is reported at 445 F.3d 913.

STATEMENT OF JURISDICTION

The final judgment of the United States Court of Appeals for the Seventh Circuit (Pet. App. 68) was entered on May 4, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] "Pet. App." refers to the appendix to the petition for certiorari.

STATUTES INVOLVED

The relevant provisions of the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.*, are as follows:

29 U.S.C. § 2614. Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this subsection, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave –

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

* * *

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(Pet. App. 86 to 90).

29 U.S.C. § 2652. Effect on existing employment benefits

(a) More protective

Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) Less protective

The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

(Pet. App. 91).

STATEMENT OF THE CASE

A. The Record Before The District Court

Petitioner Rodney Harrell was continuously employed by Respondent the United States Postal Service ("Postal Service") as a clerk at the Main Post Office in Decatur, Illinois from May 26, 1984 through April 27, 2000. (J.A. 31).[2] As a clerk, Harrell was a member of the bargaining unit represented by the American Postal Workers Union, AFL-CIO ("APWU") and covered by the Collective Bargaining

[2] "J.A." refers to the Joint Appendix submitted by the parties to the U.S. Court of Appeals for the Seventh Circuit.

Agreement between the APWU and the Postal Service ("National Agreement"). *Id.*

On February 2, 2000, Harrell went home sick from work and informed the Postal Service that he was still sick on February 3 and 4, 2000. (J.A. 31-32). On his next work day, February 7, 2000, Harrell called into the Postal Service to report that he continued to be sick, and he told his supervisor that he would be off of work at least through February 10, 2000, when he had scheduled an appointment with his doctor. *Id.*

On February 10, 2000, Harrell went to see his doctor, Doctor Robert L. Smith. (J.A. 32). Dr. Smith filled out a "Certification By Employee's Health Care Provider for Employee's Serious Illness – FMLA" form ("FMLA certification form") for Harrell. (J.A. 32, 39). Dr. Smith certified that Harrell had a serious health condition and that his absence was due to experiencing fatigue, sleep disturbance, stress and difficulty concentrating. *Id.* On the certification form, Dr. Smith provided that Harrell's health condition had commenced on February 2, 2000, and that it would have a duration of 2 to 4 weeks. *Id.*

Harrell took the FMLA certification form signed by Dr. Smith to Postmaster Doug Maxwell. (J.A. 32). The Postal Service designated Harrell's leave as Family Medical Leave Act (FMLA) approved leave after it had begun on February 3, 2000. (J.A. 10, 22, 580).

On February 23, 2000, Harrell returned to see Dr. Smith. (J.A. 33). Dr. Smith filled out another FMLA certification form certifying that Harrell could return to work on March 6, 2000. (J.A. 33, 40). Harrell took this FMLA certification form signed by Dr. Smith to the Main

Post Office, made a copy, and handed the copy to his supervisor. (J.A. 33, 585-586, 630).

On March 6, 2000, Harrell reported for work, but the Postal Service would not let Harrell clock in and begin work. (J.A. 33-34, 650). Instead, the Postal Service informed Harrell that he would not be allowed to return to work until he was examined and cleared for duty by a Postal Service contract doctor. (J.A. 33-34).

After Harrell informed Postal Service supervisor Jane Cussins, on March 6, 2000, that under the FMLA he was not required to be examined by a Postal Service doctor before returning to work, Cussins ordered him to report to her office at the Memorial Station Post Office to discuss the issue. *Id.* When Harrell arrived at Cussins' office on March 6, 2000, she informed him that she had scheduled an appointment for him with a Postal Service contract doctor at the Midwest Occupational Health Associates in Decatur, Illinois. (J.A. 34). Harrell again informed Cussins that under the FMLA, he was not required to submit to such an examination by a Postal Service contract doctor prior to returning to work. *Id.* Cussins informed Harrell that the Postal Service would not allow him to return to duty until he had been cleared by a Postal Service medical official. (J.A. 34, 587-588).

Based on Harrell's refusal to comply with the conditions imposed by the Postal Service in order to return to work from FMLA approved leave, the Postal Service refused to allow Harrell to return to his position. (J.A. 36).

On March 7, 2000, Harrell received a February 23, 2000 certified letter from Postmaster Maxwell that stated in relevant part:

> AS NOTED IN HANDBOOK EL-311, SECT.342.2, IF YOU ARE ABSENT 21 CALENDAR DAYS, ARE HOSPITALIZED, OR ARE ABSENT DUE TO A SERIOUS ILLNESS (even if you can return to full duty):
>
> 1) You must submit medical documentation outlining the nature and treatment of the illness or injury, the inclusive dates you were unable to work, and any medicines you are taking. This medical information is to be reviewed by the Postal Medical Officer.
>
> 2) You may be required to be examined by the Postal Medical Officer after your documentation is reviewed. The bill for this release for work exam will be paid by the Postal Service.
>
> The more medical information supplied by your physician, the easier it will be to obtain a release from our Medical Officer for your return to work.

(J.A. 34-35, 41).

On March 20, 2000, Harrell received a March 9, 2000 certified letter from Postmaster Maxwell informing him that he had refused to consent to be examined by a Postal Service contract physician and that he would be considered Absent Without Leave (AWOL) and could be removed from Postal Service employment if he did not comply with the Postal Service's return-to-work demands. The letter additionally stated,

> In accordance with ELM 864.4, employees returning to duty after 21 days or more of absence due to illness or serious injury require medical certification. This certification must include evidence of your ability to return to work, with or

> without limitations. A medical officer or contract physician evaluates the medical report and makes a medical assessment as to your ability to return to work before you are allowed to return.

(J.A. 36-37, 45).

Also on March 20, 2000 Harrell received a March 15, 2000 certified letter from Postal Service Manager for Customer Service Larry Abernathy informing him that he had failed to submit appropriate documentation in accordance with the March 9, 2000 letter, and that therefore, he was considered AWOL. (J.A. 37, 46). The letter also informed Harrell that he was to appear at a predisciplinary meeting on March 17, 2000, and that his failure to appear could result in his removal from Postal Service employment. *Id.*

Despite Harrell's belief that the medical documentation from his health care provider that he submitted to the Postal Service on February 23, 2000 was sufficient under the FMLA for him to return to duty on March 6, 2000, he went back to his doctor on March 23, 2000, and received another statement from Dr. Smith reiterating that Harrell was **"fit to return to work without restrictions."** (J.A. 37, 47) (Emphasis added here). Harrell turned the second medical certification into the Postal Service on March 23, 2000. (J.A. 601).

Despite this second medical certification from his health care provider of his ability to return to work immediately without restrictions, Harrell was never returned to duty by the Postal Service. (J.A. 23, 601-603, 665).

On March 27, 2000, Harrell received a Notice of Removal informing him that he would be removed from employment with the Postal Service after 30 days for being AWOL. (J.A. 37, 48-49, 814-817, 846-847). The basis

for the Postal Service's decision to remove Harrell was his failure to provide adequate medical documentation or submit to a medical examination by a Postal Service contract physician so that the Postal Service could make an independent medical determination that Harrell was fit to resume his duties. *Id.* As support for its removal decision, the Postal Service cited to Section 864.41 of the Employee and Labor Relations Manual (ELM) which states in relevant part:

864.4 Return to Duty After Extended Illness or Injury

> **864.41.** Employees returning to duty after 21 days or more of absence due to illness or serious injury require medical certification. Employees must submit medical evidence of their ability to return to work, with or without limitations. A medical officer or contract physician evaluates the medical report and makes a medical assessment to assist management in employee placement to jobs where they can perform effectively and safely. *Id.*

On April 29, 2000, Harrell received a Letter of Decision dated April 27, 2000 from Postmaster Maxwell placing him in a "non-duty, non-pay status" and removing him from employment with the Postal Service as of April 27, 2000. (J.A. 38, 50).

B. The District Court Decision

The district court granted summary judgment to the Postal Service on the question of whether the Postal Service violated the FMLA by requiring Harrell to abide by its return-to-work regulation in order to be restored to work after the completion of his approved FMLA leave.

(Pet. App. 69 to 82). One issue decided by the district court was whether the return-to-work regulation being relied upon by the Postal Service to refuse Harrell the opportunity to return to work was part of the union's collective bargaining agreement with the Postal Service. A second issue was, if the manual regulation was a part of the collective bargaining agreement, whether it was an invalid waiver of Harrell's right to restoration to his position, or an equivalent position, as set forth in 29 U.S.C. § 2614(a)(1), because the Postal Service's regulation diminished Harrell's right to restoration in violation of 29 U.S.C. § 2652(b) by requiring a more onerous return-to-work procedure than what was permitted in 29 U.S.C. § 2614(a)(4).

In addressing the first issue, the district court stated: "It is true that handbooks and manuals are unilaterally created by the USPS, but the union agreement does say that the handbooks and manuals remain in effect and that any changes therein must first be presented to the union." (Pet. App. 77).[3] The Court concluded, "[T]he language of

[3] Article 19 of the 1998 National Agreement states in pertinent part:

> Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.
>
> Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance. Proposed changes will be furnished to the Union

(Continued on following page)

the agreement can be read to incorporate by reference the provisions in the USPS handbooks and manuals." (Pet. App. 77).

In addressing the second issue, the Court addressed whether the return-to-work regulation relied upon by the Postal Service was a valid waiver of Harrell's FMLA rights:

> Contrary to Harrell's claim, however, it does not appear that the union's agreement or the USPS handbooks and manuals are infringing or waiving any of Harrell's substantive rights. USPS employees always have the right guaranteed by the FMLA to be restored to their employment following FMLA leave. The agreement and the USPS regulations merely alter the procedure by which employees go about being restored.
>
> It is possible to imagine a situation in which altering the procedure attached to a certain substantive right would in essence impinge or prohibit the exercise of that right. This case does not

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by hard copy or, if available, by electronic file. At the request of the Union, the parties shall meet concerning such changes. If the Union, after the meeting, believes the proposed changes violate the National Agreement (including this Article), it may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Within fifteen (15) days after the issue has been submitted to arbitration, each party shall provide the other with a statement in writing of its understanding of the precise issues involved, and the facts giving rise to such issues. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished to the Union upon issuance.

(J.A. 52-53, 122-123).

> present such a situation, however, given the modest and seemingly simple certification process the USPS imposes for employees who exceed 21 days of FMLA leave. Cussins was able to make Harrell an appointment with the contract doctor on the very morning he sought to return to work. Alternatively, the OHNA needed only two single-sided forms filled out by a doctor, noting Harrell's condition, treatment, medication, and work restrictions. Neither process is so onerous that it effectively abrogates Harrell's right of restoration under the FMLA.

(Pet. App. 78).

C. The First Decision Of The Court Of Appeals

The court of appeals unanimously reversed the decision of the district court on the issue of whether the Postal Service's requirement that Harrell abide by its return-to-work regulation in order to be restored to work violated the FMLA. (Pet. App. 35 to 65). The court identified the central issue in the case:

> [W]hether the Postal Service can rely upon its own return-to-work regulations, as incorporated into a valid collective bargaining agreement, to impose requirements on employees that are more burdensome than what is required by the return-to-work provisions of the FMLA. To resolve this issue, we must consider the interplay between 29 U.S.C. § 2614 and § 2652.

(Pet. App. 54).

In examining the provisions of the FMLA statute, the court of appeals held:

> To give effect to the right to take leave under the FMLA, Congress designed the statute to require employers to restore employees to work after taking such leave upon a basic showing of being able to perform their duties, which is done by a simple statement to that effect from one's own physician. The statute does indicate that the conditions by which an employee returns to work can be other than those contemplated by the statute and its implementing regulations, if those conditions are set forth in a governing collective bargaining agreement. However, any provision of a collective bargaining agreement that replaces provisions of the Act or its regulations must grant more or equal, not less, protection to the employee. This reading of the statute seems to us to be the only reasonable way to harmonize the plain wording of the two sections.

(Pet. App. 56).

The court found that the FMLA did not permit an employer to follow the terms of a collective bargaining agreement when that agreement imposed greater burdens on employees' return to work from FMLA leave than provided under the statute and regulations, and that such a reading would give more force to the general terms of § 2614 over the more particular terms of § 2652.

The court of appeals concluded that in order to return employees to work from FMLA leave, all the provisions of the FMLA and its implementing regulations allowed an employer to obtain is a certification from the employee's health care provider that the employee is fit to resume his or her duties. The Postal Service's reliance on its return-to-work regulations incorporated into the collective bargaining agreement was unavailing because those regulations impose a greater burden on an employee's right to

return to work, and therefore are not consistent with § 2652. The court reaffirmed an employer's right to require an employee to submit to a fitness for duty examination after he or she returned to work, but held that the "FMLA and its regulations simply prevent an employer, including the Postal Service, from denying a *return* to work by an employee who presents, upon his return, the requisite certification from his physician." (Emphasis in original) (Pet. App. 59).

D. The Postal Service's Petition For Rehearing

The Postal Service filed a petition for rehearing or rehearing en Banc. The Secretary of Labor (DOL) filed an *amicus curiae* brief in support of the Postal Service's petition. The court of appeals granted the Postal Service's petition for rehearing and vacated its earlier decision. The court requested the parties, including the DOL as *amicus curiae*, address the issue of whether the Department of Labor Regulations are sufficiently specific to warrant judicial deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

E. The Second Decision Of The Court Of Appeals

In its second decision, the court of appeals unanimously affirmed the decision of the district court. (Pet. App. 1 to 34). Again, the court identified the central issue in the case:

> Whether the Postal Service can rely upon return-to-work regulations incorporated into a valid collective bargaining agreement to impose requirements on employees that are more burdensome than what is set forth in the statute.

(Pet. App. 19 to 20).

The court acknowledged that its starting point was with the language of the statute, specifically 29 U.S.C. §§ 2614(a)(4) and 2652. The court recognized that if the intent of Congress, as expressed in the language of the statute, is clear with respect to the issue, then the court's inquiry is at an end, and it must give effect to the unambiguously expressed intent of Congress. Contrary to its prior decision, the court of appeals found that Congress did not clearly address the question at issue through the statutory language. (Pet. App. 22 to 23). It held that Harrell's interpretation of § 2614(a)(4) would render the last clause of that paragraph "superfluous." (Pet. App. 23). It further held that the interpretation urged by the Postal Service, that § 2614(a)(4) is an exception to the rule preventing collective bargaining agreements from diminishing rights under the FMLA (29 U.S.C. § 2652(b)) is "consonant with general canons of statutory interpretation." (Pet. App. 23). Finally, the court found that it could not "conclude that Congress *clearly* addressed the question at issue through the statutory language." (Pet. App. 24). As a result, the court turned to look at the DOL's position on the issue and determine whether the DOL's position was a reasonable construction of the statute.

The court found that the agency's answer to the question at issue, through the FMLA regulations and an FMLA opinion letter, is that a collective bargaining agreement may impose more stringent return-to-work requirements on an employee than those set forth in the statute. (Pet. App. 24 to 26). The court determined that the DOL's interpretation was reasonable and therefore was entitled to deference. (Pet. App. 26 to 28). Therefore, the court concluded that the Postal Service did not violate the FMLA when it required Harrell to comply with return-to-work provisions set forth in a Postal Service manual that

imposed stricter return-to-work requirements than were otherwise allowable under the FMLA.

ARGUMENT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FIRST IMPRESSION THAT HAVE BEEN DECIDED INCORRECTLY BY THE SEVENTH CIRCUIT IN RELIANCE UPON A DEPARTMENT OF LABOR INTERPRETATION OF THE FMLA THAT IS CONTRARY TO THE PLAIN LANGUAGE OF THAT ACT.

A. This Case Raises Important Questions That Should Be Resolved By The Court Without Further Delay.

The United States Postal Service employs more than 700,000 people, a large majority of whom are in bargaining units subject to the Postal Service's Employee and Labor Relations Manual. This means that in the Postal Service alone this case implicates the Family and Medical Leave Act rights of more than 600,000 people.[4] Further, as the U.S. Attorney observed in his Petition for Rehearing or Rehearing en Banc filed on behalf of the Postal Service in the court below, at 3, "[t]he statutory provisions at issue

[4] The President's Commission on the U.S. Postal Service Final Report observed that the Postal Service employed 741,000 career employees in 2002, and 657,000 of them were in collective bargaining units. EMBRACING THE FUTURE, Report of the President's Commission on the United States Postal Service (July 31, 2003) (available at http://www.usps.com/communications/organization/whoweare) or through http://bookstore.gpo.gov. *See also* STRATEGIC TRANSFORMATION PLAN OF THE U.S. POSTAL SERVICE 2006-2010, at 53 (September 2005) (available at http://www.usps.com).

here apply not just to the Postal Service, but to all private employers with 50 or more employees. The resolution of this issue therefore affects the validity and enforceability of countless collective bargaining agreements." Likewise, the U.S. Department of Labor supported the Petition for Rehearing en Banc on the ground that the panel's first opinion "presents a question 'of exceptional importance.'"[5]

As we explain in this Petition, the decision of the court below is contrary to the plain meaning of the Act. Because of that fact, the court of appeals' decision to defer to the position of the Department of Labor in this case is inconsistent with the Court's rulings on deference to administrative agencies. Moreover, the Court's deferral to the Department's incorrect position in this case means that the erroneous decision below will have far-reaching consequences. The Court should resolve these issues now because the decision below calls into question the FMLA return-to-work rights of numerous unionized employees and numerous employees of state and local governments.

B. The Court's Decision Is Contrary To The Plain Language Of The Act.

1. The Statutory Language Is Clear.

Section 2614(a)(1) gives employees returning from FMLA leave an unfettered right to return to their position

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[5] The Postal Service and the DOL also claimed that the Seventh Circuit's first decision in this case conflicted with decisions by two other circuits. That contention has no merit for the reasons stated in Harrell's Answer to the Petition for Rehearing or Rehearing en Banc, at 12-13. The court below did not rely on those alleged conflicting decisions in reversing its opinion in this case.

or an equivalent position.[6] In particular, they have a right to return to work without having to show medical evidence of their fitness for duty. Under § 2614(a)(4), however, employers may establish a policy that requires employees to provide a medical certification of fitness for duty before they return to work.

Under § 2614(a)(4) there are two exceptions to the right of employers to require employees to obtain a certification of fitness to return to duty. The last clause of § 2614(a)(4) provides:

> . . . except that *nothing in this paragraph* shall supercede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

[Emphasis added here.]

The Postal Service contends, and the court below so held on reconsideration, that this provision means that collective bargaining agreements can further restrict an employee's otherwise unfettered right to return to duty – beyond the mere certification requirement employers are permitted to establish under § 2614(a)(4). (445 F.3d at 927; Pet. App. 28). Nothing in § 2614(a)(4) supports this interpretation.

Under § 2614(a)(4) the employer's right to establish a fitness for duty certification policy is conditional. If there is an applicable State or local law, or an applicable collective bargaining provision governing return to duty, then the employer's right to establish a medical certification requirement is subject to the applicable law or labor agreement. Thus, § 2614(a)(4) gives employers the right to

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[6] Exceptions for certain highly compensated employees are not relevant in this case. 29 U.S.C. § 2614(b).

establish a narrowly limited exception to employees' right to return to duty – returning employees may be required to provide a fitness for duty certification. There is no provision in § 2614(a)(4) that would also make a collective bargaining agreement supercede employees' return-to-duty rights under § 2614(a)(1).

In explaining its revised reading of § 2614(a)(4), the court below accepted the argument of the Postal Service that our reading of § 2614(a)(4) renders it "superfluous." We show below that § 2614(a)(4) has important meaning as we read it. But, more to the point, the court's reading of § 2614(a)(4) is insupportable by reference to the language of the statute and reaches results that are contrary to the purposes of the Act.

2. Harrell's Reading Of The Act Gives Meaning To Both §§ 2614(A)(4) And 2652(B).

In its first opinion in this case, reversing the district court's decision, the court below stated:

> . . . the pivotal issue in this case: whether the Postal Service can rely upon its own return-to-work regulations, as incorporated into a valid collective bargaining agreement, to impose requirements on employees that are more burdensome than what is required by the return-to-work provisions of the FMLA. To resolve this issue, we must consider the interplay between 29 U.S.C. § 2614 and § 2652.

(415 F.3d at 711; Pet. App. 54).[7] The court squarely held that

[7] 29 U.S.C. § 2652(b) provides:

§ 2652 Effect on existing employment benefits

* * *

(Continued on following page)

> [A]ny provision of a collective bargaining agreement that replaces provisions of the Act or its regulations must grant more or equal, not less, protection to the employee. This reading of the statute seems to us to be *the only reasonable way to harmonize the plain wording of the two sections*.

[Emphasis added here.] (415 F.3d at 712; Pet. App. 56).

In reversing itself on this "pivotal issue," the court below made a critical mistake. The court stated, (445 F3d. at 925; Pet. App. 23):

> There are two possible ways to reconcile these provisions. The first is the interpretation urged by Mr. Harrell – that a CBA can provide greater, but not fewer, rights to employees. *This interpretation, however, renders the last clause of § 2614(a)(4) superfluous*, a result that we usually try to avoid. . . .

[Emphasis added here.]

In this holding, the court erred, for § 2614(a)(4) serves two important purposes that are not served by § 2652.

a. The § 2614(A)(4) Exception Is Necessary To Preserve Collective Bargaining Agreements.

A collective bargaining agreement is a large set of "uniformly applied policies" of the sort dealt with in

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(b) Less Protective

The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

(Pet. App. 91).

§ 2614(a)(4). Section 2614(a)(4) concerns one of the issues dealt with in collective bargaining – the conditions under which people are permitted to return to work after medical leave. Thus, the Court is correct that § 2614(a)(4) is more specific than § 2652. If § 2614(a)(4) did not make an exception for collective bargaining agreements, the employer in this case would be arguing that the specific return-to-duty provisions of § 2614(a)(4) give employers the right to establish a "uniform policy" governing return to duty regardless of collective bargaining agreements. In this one situation, they would argue, the rules laid down by § 2652 do not apply, because the more particular provision of the statute would give the employer the right to establish a uniform policy governing return to duty. This argument is not possible because of the exception provision in § 2614(a)(4).

Thus, the exception clause in § 2614(a)(4) is necessary to ensure that uniformly established employer policies on return to duty will not take precedence over collective bargaining agreements that govern return to duty. The rule of § 2652(a), that collective bargaining agreements are generally not nullified by the Act, is preserved against § 2614(a)(4) by the exception in § 2614(a)(4); and the rule of § 2652(b) that collective bargaining agreements may not diminish rights established by the Act is also given effect.

The court's reading would permit collective bargaining agreements to be given effect even if they limit return-to-duty rights established outside § 2614(a)(4). Thus, the court's reading partially nullifies § 2652 and partially nullifies return-to-duty rights established not in § 2614(a)(4) but in § 2614(a)(1). This is a misreading of the clear language of the statute.

b. Section 2614(A)(4) Protects Rights That Are Not Protected By § 2652.

Under § 2652(b), a collective bargaining agreement cannot diminish statutory rights – including the right to return to duty. But § 2652(b) does not protect the FMLA right to return to duty under § 2614(a)(1) from limitation by an *employer-established* policy requiring medical certification established under § 2614(a)(4). On the other hand, under the exception to § 2614(a)(4), if a collective bargaining agreement applies, the employer cannot modify the right to return to duty in a way that would be inconsistent with the agreement. Thus, the § 2614(a)(4) exception is different from and in addition to the protection provided by § 2652(b).

Paragraph 2614(a)(4) is also quite different in its effect from § 2652(a). If an employer were to promulgate a return-to-duty provision more restrictive than a collective bargaining agreement, § 2652(a) would preserve the validity of the agreement and the right of the union party to the agreement to enforce that agreement through any applicable collectively bargained grievance-arbitration process, by providing that the employer must comply with that agreement.

Under § 2614(a)(4), however, employers are not permitted to promulgate medical certification requirements that would be more restrictive than applicable collective bargaining agreements. Because the employer's policy cannot replace the agreement in that instance, the statutory right to return to duty is not limited, and the employee's right to assert that right under the law is also preserved.

An example will serve to illustrate this point. In the example, the agreement provides a contractual right to return to duty without providing medical certification. The employer attempts to promulgate a uniform policy that would require medical certification to return to duty and begins to enforce that requirement. If only § 2652(a) were in the statute, the employee would be able to grieve and arbitrate the employer's policy as a contract violation. Because of the exception in § 2614(a)(4), however, the employer's policy would not be a valid limitation on the unfettered right to return to duty under § 2614(a)(1). If the employer were to try to enforce the medical certification requirement, the employee would have a right to bring suit under the Act for violation of return-to-duty rights under § 2614(a)(1).

In sum, §§ 2614(a)(4) and 2652 are consistent and must be given effect as written. Despite the clarity and consistency of the statute, the court below embarked on a lengthy analysis of regulations issued by the Department of Labor. That exercise was undertaken in contravention of this Court's teaching that statutes clear on their face need no regulatory gloss. Thus, the court below erred in undertaking its analysis of the regulations. Regrettably, it erred in that analysis as well. It relied on an interpretation of the regulations that is not supported by the text of the law or the regulations and that is contrary to the plain meaning of the statute.

C. The Court Below Erred In Relying On The Department Of Labor's Interpretive Regulations And Opinion Letter.

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a reviewing

court must first ask "whether Congress has directly spoken to the precise question at issue." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (quoting *Chevron*, 467 U.S. at 842). If Congress has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron*, 467 U.S. at 843). Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. *Id.* at 159. Deference is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent. *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-448 (1987) (citing *Chevron*, 467 U.S. at 843, n. 9)).

As we explain above, the statutory language is plain and consistent. Under the teachings of *Chevron* and its progeny, it was an error for the court below to seek additional guidance from the Department of Labor's interpretive regulations. For the same reasons, this Petition is not the place for a lengthy exegesis of the Department's interpretive regulations. We do, however, need to make several observations about the potential value of that exercise.

1. We observe that the Department of Labor's interpretive regulations do little more than paraphrase the requirements and limitations of the statute. In its first decision in this case, the court below considered the regulations and found them unpersuasive in the face of the clear language of the statute. (415 F.3d at 712-13, nn. 4, 5; Pet. App. 57 to 58). Although the court on reconsideration

found the regulations to be more meaningful, the fact remains that the regulations do not expressly deal with the question whether a collective bargaining agreement that diminishes statutory rights may be given effect. (445 F.3d at 925-27 and nn. 5, 6; Pet. App. 58 to 27).

2. In deciding that the regulations support the position taken by the Postal Service and the Department of Labor in this case, despite the gap left by their failure expressly to discuss what happens when collective bargaining agreements limit FMLA return-to-duty rights, the court below seemed to be substantially impressed by a September 11, 2000, DOL Opinion Letter. (J.A. 923-925). In commenting on the letter, the court observed (445 F.3d at 926-27, n. 6; Pet. App. 26 to 27):

> Thus, the Department of Labor consistently has taken the position that § 2614(a)(4) means that return-to-work provisions set forth in a CBA, whether providing greater or fewer protections to employees than are explicitly set forth in the FMLA, take precedence over the statutory protections provided to employees in the Act.

In this view, however, the court below was mistaken. As explained in THE FAMILY AND MEDICAL LEAVE ACT 202-203 (ABA Labor and Employment Law, Michael J. Ossip, et al., eds., 2006):

> Shortly after the Act was enacted, the DOL expressed the view that such a provision in a collective bargaining agreement applied instead of the FMLA's return to work certification requirements *so long as it did not diminish protections established by the FMLA*. Later, however, the DOL expressed the opinion that so long as the employer . . . notifies an employee in a timely

> fashion that return to work provisions of a collective bargaining agreement will be applied, those requirements can be imposed instead of those contained in the FMLA.

[Footnotes omitted.] In its footnotes, the ABA FMLA Treatise summarizes the two DOL opinion letters as follows:

> "214 WH Admin. Op. FMLA-58 (April 28, 1995), Wage & Hour Manual 99:3056 (reading 29 C.F.R. under 2614(a)(4) § 825.310(b) in conjunction with 29 C.F.R. § 825.700(a) ('an employer must observe any employment benefit program or plan that provides any greater family or medical or leave rights to employees that [sic] than the rights established by the FMLA, including greater rights provided under the terms of a collective bargaining agreement. However, the rights and benefits established by the FMLA may not be diminished by any employment benefit program or plan.')"
>
> "215 WH Admin. Op. FMLA-113 (Sept. 11, 2000) Wage & Hour Manual 99:3131-32 (discussing 29 C.F.R. § 825.310(b) but not 29 C.F.R. 825.700(a)."[5]

3. Thus, in WH Admin. Op. FMLA-58 (April 28, 1995), the DOL took a position diametrically opposite the position it took in its September 11, 2000, opinion letter, and diametrically opposite the position it took in the court below. We also observe that WH Admin. Op. FMLA-58 was issued contemporaneously with the publication of the DOL's FMLA regulations. The final FMLA regulations were effective April 6, 1995, just 22 days before the issuance of

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[5] These opinions are available at http://www.dol.gov/esa/whd/opinion/opinion.htm.

WH Admin. Op. FMLA-58 (April 28, 1995). If it had been appropriate for the court below to look at the regulations and opinion letters of the DOL for assistance in interpreting the Act, it would have been most appropriate for the court to examine the DOL's first opinion on this issue.

II. GIVEN THAT WAIVERS OF STATUTORY RIGHTS BY COLLECTIVE BARGAINING AGREEMENTS MUST BE CLEAR AND UNMISTAKABLE, THE UNION'S PASSIVE INCORPORATION BY REFERENCE OF THE EMPLOYER'S UNILATERAL RETURN-TO-DUTY REQUIREMENTS DOES NOT WAIVE THE FMLA RIGHT OF POSTAL EMPLOYEES TO BE REINSTATED WITHOUT MEETING THOSE REQUIREMENTS.

Setting aside for the moment our disagreement with the court's holding that a collective bargaining agreement may impose more stringent return-to-duty requirements of this sort, we now observe that the Postal Service manual in this case is not the product of collective bargaining and should therefore not be given the force and effect of a collective bargaining agreement.

We first observe that the effect of the manual provision at issue here goes well beyond the requirement that additional paperwork be filled out. Mr. Harrell was so reluctant to provide detailed personal health information to Postal Service medical personnel that he subjected himself to discharge for refusing to do so. Moreover, when Mr. Harrell did not provide the information the Postal Service sought, the Postal Service made an appointment for him to be examined by a postal doctor and ordered him to keep the appointment. This led to an extremely unpleasant confrontation in which Mr. Harrell refused to be examined by a doctor not of his own choosing. (J.A. 34-36).

These events give emphasis to the importance of the absolute right to be provided reinstatement under § 2614(a)(1) of the Act, and to the very limited nature of the exception in § 2614(a)(4) that permits employers to require a simple certification of fitness for duty from the employee's personal physician.

The court below held that the return-to-duty provisions of the Postal Service's Employee and Labor Relations Manual (ELM) are "incorporated by reference" into the collective bargaining agreement (the National Agreement). (445 F.3d at 922-23; Pet. App. 17 to 19). On that basis, the court held that postal employees may be required to comply with return-to-duty medical information requirements that are more intrusive than a simple certification of fitness for duty from the employee's own health care provider that may be required under § 2614(a)(4) of the Act. (445 F.3d at 927; Pet. App. 28). The validity of this holding must be examined in the light of the substantial jurisprudence of this Court concerning the circumstances under which it is appropriate to conclude that a union has waived its members' statutory rights through collective bargaining.

Although the outer limits of a union's authority to waive the statutory rights of employees it represents have not been determined, this much is clear, if a union is to waive the statutory rights of those it represents, the waiver must be "clear and unmistakable." *Wright v. Univ. Maritime Serv. Corp.*, 525 U.S. 70, 80-81 (1998) (union-negotiated waiver of statutory right to a judicial forum for claims of employment discrimination); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 673, 709 (1983) (waiver of union officers' statutory right to be free of anti-union discrimination); *see Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279, 281 (1956) (right to strike over unfair labor practices despite general no-strike clause).

The facts related to this issue are undisputed. Article 19 of the National Agreement requires the employer to comply with its own handbooks and manuals insofar as they directly relate to wages, hours or working conditions. (J.A. 52-53, 122-123). Article 19 also permits the employer to promulgate new handbook and manual provisions unilaterally, as long as those provisions do not violate the National Agreement. *Id.* The union has a right to challenge newly promulgated provisions if it contends that they violate the National Agreement or are not fair, reasonable and equitable. *Id.* On the basis of these facts, a number of courts, including the court below, have held that the employer's manual provisions are "incorporated by reference" into the National Agreement. (445 F.3d at 922-23; Pet. App. 17 to 19). On the basis of that conclusion, the court below held that, through Article 19, the union has entered into a collective bargaining agreement that waives the reinstatement rights of postal employees under the FMLA.

It requires no extended analysis to demonstrate that there is a significant difference between collective bargaining negotiations and what has occurred in this case. Under the Article 19 procedure, there is no collective bargaining over the manual provisions. There is no mutuality. The most that can be said is that the union may have acquiesced in the employer's promulgation of the rules. By no means can these circumstances be stretched to fit the "clear and unmistakable waiver" standard applicable to the waiver of statutory rights.

Given the significance of the developing law concerning union waivers of statutory rights, and given the importance of this issue to more than 600,000 employees of the Postal Service, the Court should issue a writ of

certiorari on this issue and reverse the decision of the court below.

CONCLUSION

For the above stated reasons, Rodney Harrell's petition for a writ of certiorari should be granted.

Respectfully submitted,

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445 F.3d 913

In the
United States Court of Appeals
for the Seventh Circuit

No. 03-4204

RODNEY HARRELL,

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 02-C 2056 – **Michael P. McCuskey**, *Chief Judge.*

ARGUED SEPTEMBER 24, 2004 – DECIDED JULY 19, 2005
REARGUED DECEMBER 9, 2005 – DECIDED MAY 4, 2006

Before FLAUM, *Chief Judge*, and RIPPLE and WILLIAMS, *Circuit Judges.*

RIPPLE, *Circuit Judge*. Rodney Harrell filed this action against his former employer, the United States Postal Service ("USPS" or "Postal Service"), alleging violations of the Family and Medical Leave Act ("FMLA" or "Act"), 29 U.S.C. § 2601 et seq. The parties filed cross-motions for summary judgment, and the district court granted summary judgment in favor of the Postal Service. Mr. Harrell appealed. This panel initially affirmed in part and reversed in

part the judgment of the district court. On the petition of the Postal Service, with the United States Department of Labor ("Department") as amicus curiae, the panel granted rehearing. For the reasons set forth in the following opinion, we affirm the judgment of the district court in its entirety.

I

BACKGROUND

A. Facts

Mr. Harrell began working for the Postal Service in 1984 as a clerk at the Decatur, Illinois post office. He was a member of a collective bargaining unit represented by the American Postal Workers Union, AFL-CIO ("APWU" or "Union"), and he was covered by a national collective bargaining agreement between the APWU and the Postal Service known as the National Agreement.

On February 2, 2000, Mr. Harrell felt ill and left work early. On February 10, 2000, he submitted to the Postal Service a medical form completed by his physician, Dr. Robert Smith, which certified that his absence was due to fatigue, stress, sleep disturbance and difficulty concentrating. Dr. Smith indicated that the health problems had begun on February 2 and probably would last four weeks. On February 23, 2000, Mr. Harrell submitted a second health certification, in which Dr. Smith estimated that he would be able to resume work on March 6, 2000.

The Postal Service responded by a letter dated February 23, 2000, and advised Mr. Harrell that, according to postal regulations, in order to return to work,

> (1) You must submit medical documentation outlining the nature and treatment of the illness

> or injury, the inclusive dates you were unable to work, and any medicines you are taking. This medical information is to be reviewed by the Postal Medical Officer.
>
> (2) You may be required to be examined by the Postal Medical Officer after your documentation is reviewed. The bill for this release for work exam will be paid by the Postal Service.

R.27, Ex.A, Ex.3. Mr. Harrell maintains that he did not receive this letter until March 7, 2000.

Mr. Harrell attempted to return to his job on March 6. However, Jane Cussins, the Decatur post office supervisor, informed him that he had not been cleared to return to work; at that time she explained the applicable postal regulations to Mr. Harrell. In order to facilitate the clearance process, Cussins made him an appointment for an examination by the USPS-contract physician for later that morning. Mr. Harrell went to the physician's office, but he refused to consent to an examination because he believed that he already had provided the Postal Service with sufficient medical information to entitle him, under the FMLA, to return to work. Mr. Harrell returned to Cussins' office, and she told him that she would fax the documentation submitted by Mr. Harrell to the postal nurse for review.

The postal nurse reviewed the February 10 and February 22 certifications submitted by Mr. Harrell, and she concluded that the information was insufficient to clear him for duty. Specifically, the forms had no information about continuing medications, restrictions on Mr. Harrell's ability to work or when he had been declared fit to return to work. On March 10, 2000, the postal nurse

called Mr. Harrell to obtain his physician's contact information; he refused to provide the information and expressly stated that he did not want her to contact his physician. Two weeks later, nonetheless, the postal nurse faxed a return-to-work form to Dr. Smith's office. The office refused to release any medical information without Mr. Harrell's consent.

In the meantime, the Postal Service mailed Mr. Harrell a letter dated March 9, 2000, reminding him that

> employees returning to duty after 21 days or more of absence due to illness or serious injury require medical certification. This certification must include evidence of your ability to return to work, with or without limitations. A medical officer or contract physician evaluates the medical report and makes a medical assessment as to your ability to return to work before you are allowed to return.

R.27, Ex.A, Ex.5. The letter also explained that the forms prepared by Dr. Smith, which had explained Mr. Harrell's need for leave, were insufficient to clear him for duty because they did not describe the nature of treatment he received or list any medications he was taking. Finally, the letter advised that, if he did not present appropriate documentation within five days, he would be considered absent without leave and subject to discipline, including removal. This letter was sent by both regular and certified mail.

On March 15, 2000, having not received a reply from Mr. Harrell, the Postal Service mailed him another letter (also via regular and certified mail) which declared him absent without leave and scheduled a predisciplinary hearing for March 17. The letter advised that failure to

appear could result in disciplinary action, including removal. On March 22, the Postal Service sent Mr. Harrell a notice of removal.

On March 21, 2000, Mr. Harrell sent a letter to the Postal Service. He maintained that he had not received the March 9 and March 15 warning letters until March 20. He also asserted that the medical documentation he had provided in order to qualify his absence as FMLA leave was sufficient by law to entitle him to return to work. Despite this belief, Mr. Harrell returned to Dr. Smith and obtained a return-to-work certification. The certification, dated March 23, 2000, stated that Mr. Harrell was "fit to return to work without restrictions." R.27, Ex.A, Ex.7.

The Postal Service responded to Mr. Harrell by letter on March 31, 2000, which advised:

> You were notified in writing on February 23, 2000, that this medical documentation had to include the nature of treatment of your illness and any medicines you were taking. You have again failed to provide medical documentation adequate for the Postal Medical Officer to make a determination as to your ability to return to work.
>
> In conclusion, we want the opportunity to review medical documentation from your attending physician that includes all the required information. We have scheduled the following appointment for you to be examined by the Postal contract physician.

R.22, Ex.6, Ex.10. Mr. Harrell again refused to provide further information or to submit to an examination. By letter dated April 27, 2000, the Postal Service terminated his employment.

B. District Court Proceedings

Mr. Harrell alleged that the Postal Service violated the FMLA in five ways: (1) failing to restore him to work after he presented a medical clearance; (2) requiring him to submit to a medical examination by a USPS-contract physician prior to allowing him to return to work; (3) terminating his employment because he took FMLA leave; (4) contacting his physician without his consent; and (5) failing to provide him with notice of the Postal Service's return-to-work requirements and the consequences of not complying with those requirements. The parties filed cross-motions for summary judgment, and the district court granted summary judgment in favor of the Postal Service.

1.

With respect to Mr. Harrell's first three claims, the Postal Service asserted that the conditions it had placed on his return to work were permitted by the National Agreement that incorporated by reference the postal handbooks and manuals governing employees' leave. Specifically, the Postal Service contended that any return-to-work certification requirements included in a collective bargaining agreement ("CBA") take precedence over the FMLA's return-to-work provisions under 29 U.S.C. § 2614(a)(4), which provides that employers may impose

> a uniformly applied practice or policy that requires each employee to receive certification from the health care provider of the employee that the employee is able to resume work, *except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining*

> *agreement that governs the return to work of such employees.*

Id. (emphasis added).

Mr. Harrell contended that the Postal Service was precluded from arguing that the National Agreement incorporated the postal regulations governing return to work after FMLA leave because the Postal Service previously made, and lost, the same argument in a different case. The district court, however, determined that *United States v. Mendoza,* 464 U.S. 154, 162 (1984), did not allow Mr. Harrell to invoke the doctrine of collateral estoppel offensively against the United States based on a litigation to which he was not a party.

The district court then concluded that the postal handbooks and manuals are part of the National Agreement. It further determined that, because the postal regulations had the force of a valid collective bargaining agreement, those regulations, and not the FMLA's provisions, controlled Mr. Harrell's right to reinstatement. In addition, the district court found that the postal regulations justified the Postal Service's requirement that Mr. Harrell provide more detailed medical documentation from his health care provider or submit to a medical examination by a USPS-contract physician. Moreover, the district court believed that such requirements did not diminish any substantive right provided by the FMLA. The court took the view that

> USPS employees always have the right guaranteed by the FMLA to be restored to their employment following FMLA leave. The agreement and the USPS regulations merely alter the procedure by which employees go about being restored.

> It is possible to imagine a situation in which altering the procedure attached to a certain substantive right would in essence impinge on or prohibit the exercise of that right. This case does not present such a situation, however, given the modest and seemingly simple certification process the USPS imposes for employees who exceed 21 days of FMLA leave. Cussins was able to make Harrell an appointment with the contract doctor on the very morning he sought to return to work. Alternatively, the [postal nurse] needed only two single-sided forms filled out by a doctor, noting Harrell's condition, treatment, medication, and work restrictions. Neither process is so onerous that it effectively abrogates Harrell's right of restoration under the FMLA.

R.41 at 9.

2.

Next, the district court granted the Postal Service summary judgment on the claim that it had failed to provide Mr. Harrell with adequate notice of the requirements for returning to work and of the consequences for not meeting those requirements. *See* 29 C.F.R. § 825.310(c). The district court pointed to Mr. Harrell's "deposition testimony in which he admits that he was aware of the USPS regulations concerning returning to work following an absence of more than 21 days." R.41 at 11. The court noted, moreover, that Mr. Harrell was informed of the return-to-work requirements by the letters from the Postal Service and by Cussins, to whom he had spoken when he attempted to return to work.

3.

Finally, the district court granted the Postal Service summary judgment on Mr. Harrell's claim that the Postal Service had violated the FMLA by contacting his personal physician without his consent. *See* 29 C.F.R. § 825.310(c). Although the district court found that a violation had occurred, it dismissed the claim because Mr. Harrell had suffered no injury in that Dr. Smith's office did not release any information that contributed to his termination.

II

DISCUSSION

A. Standard of Review

We review a district court's grant or denial of summary judgment de novo. *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir. 2000). In doing so, we construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Id.* Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

B. Failure to Return to Work

Congress enacted the FMLA in order to assist workers in meeting the needs of their families and the demands of their jobs. *See Price v. City of Fort Wayne*, 117 F.3d 1022, 1023 (7th Cir. 1997). The statute responded to the perception that

> [p]rivate sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to impose a heavy burden on families, employees, employers and the broader society. [This legislation] provides a sensible response to the growing conflict between work and family by establishing a right to unpaid family and medical leave for all workers covered under the act.

S. Rep. No. 103-3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2, 6 ("S. Rep. 103-3"). The FMLA makes available to eligible employees up to twelve weeks of leave during any twelve-month period for one or more of the following reasons: (1) the birth of the employee's child; (2) the placement of a child with the employee for adoption or foster care; (3) the care of the employee's child, spouse or parent who has a serious health condition; and (4) the inability of the employee himself to perform the functions of his position because of a serious health condition. 29 U.S.C. § 2612(a)(1). At the conclusion of a qualified-leave period, the employee is entitled to return to his former position of employment, or to an equivalent one, with the same terms and benefits. *Id.* § 2614(a)(1);[1] *see also* 29

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[1] Section 2614(a)(1) provides:

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave –

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(Continued on following page)

C.F.R. § 825.214(a). To protect these rights, the FMLA declares it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided." 29 U.S.C. § 2615(a)(1). In this case, Mr. Harrell contends that the Postal Service violated his rights under the FMLA by refusing to return him to his position after his physician provided an unqualified certification of his fitness to return to duty.

An employee's right to return to work after taking FMLA leave is not unlimited. The Act seeks to accomplish its purposes "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(3); *see also* 29 C.F.R. § 825.101(b) ("The enactment of the FMLA was predicated on two fundamental concerns – the needs of the American workforce, and the development of high-performance organizations."). An employee is not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." 29 U.S.C. § 2614(a)(3)(B); *see also* 29 C.F.R. § 825.216(a) ("An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period."). An employee returning from FMLA leave also is not entitled to restoration if he cannot

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> (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. § 2614(a)(1).

perform the essential functions of the position or an equivalent position.[2] 29 C.F.R. § 825.214(b).

In addition, the Act permits an employer, as a condition of restoring employees who take FMLA leave, to have a policy that requires all such employees to obtain medical certification from their personal health care provider indicating that the employee is able to resume work. 29 U.S.C. § 2614(a)(4). The Act provides that nothing in § 2614(a)(4) "shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of employees." *Id.* The interplay between the FMLA's return-to-work provisions and a CBA that governs the return of employees who take leave due to a serious health condition is discussed in the statute's accompanying regulations:

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[2] The Department of Labor regulations discuss an employee's right to restoration:

> (a) On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions or employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* § 825.106(e) for the obligations of joint employers.
>
> (b) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act (ADA). *See* § 825.702.

29 C.F.R. § 825.214.

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. . . .

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

29 C.F.R. § 825.310(a)-(c).

In the present case, the Postal Service maintains that it had the right, under the FMLA, to require Mr. Harrell to provide sufficient medical documentation from his health care provider or to be cleared for duty by a USPS-contract physician, as a condition of returning to work. In the Postal Service's view it appropriately employed, under 29 U.S.C. § 2614(a)(4), a uniform practice requiring employees to provide a fitness-for-duty certification from their personal health care provider; and, although the accompanying regulations provide that this certification need only be a simple statement of the employee's ability to work, *see* 29 C.F.R. § 825.310(c), the FMLA's certification provisions do not supersede a valid collective bargaining agreement that governs return to work for such employees, *see* 29 U.S.C. § 2614(a)(4); 29 C.F.R. § 825.310(b).

Mr. Harrell challenges this theory on four grounds: (1) collateral estoppel forecloses the Postal Service from arguing that the terms of the National Agreement allow it to limit postal employees' right to return to work after FMLA leave; (2) the postal handbooks and manuals are not part of the National Agreement; (3) the postal return-to-work provisions are invalid because they diminish a substantive right afforded by the FMLA; and (4) the requirements imposed by the Postal Service in this case contravened the postal return-to-work provisions. We shall address these issues in turn.

1. Collateral Estoppel

Mr. Harrell first contends that the Postal Service is precluded from arguing that its handbooks and manuals are negotiated parts of the National Agreement because it raised and lost this argument in *Routes v. Henderson*, 58

F. Supp. 2d 959, 994 (S.D. Ind. 1999). The doctrine of collateral estoppel provides that "once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation." *Mendoza,* 464 U.S. at 158. The "offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party." *Id.* at 159 n.4. Mr. Harrell seeks to invoke nonmutual collateral estoppel, which occurs when the plaintiff was a nonparty to the prior lawsuit. *Id.* The district court determined that applying this doctrine against the Postal Service was not appropriate. We review a district court's decision whether to apply offensive collateral estoppel for an abuse of discretion. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 331 (1979).

As the district court recognized, the Supreme Court has established that nonmutual offensive collateral estoppel does not extend to litigation against the United States. *Mendoza,* 464 U.S. at 162. The United States differs from private litigants in that its litigation is geographically broad and often involves issues of national significance. *Id.* at 159-60. Among other concerns expressed by the Court, precluding the United States from relitigating issues against different parties would "thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue" and would "deprive th[e] Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before" it grants certiorari. *Id.* at 160.

Mr. Harrell submits that *Mendoza* does not apply in this case because Congress has placed the Postal Service on the same footing as a private litigant by authorizing it to "sue and be sued." 39 U.S.C. § 401. Mr. Harrell reads too much into this waiver of immunity: That the Postal Service is amenable to the judicial process does not "change the fact that the party being sued is still the federal government." *In re Young,* 869 F.2d 158, 159 (2d Cir. 1989) (per curiam). Indeed, Congress has provided that the Postal Service "is part of the executive branch of government, that its employees are part of the federal civil service, and that it possesses certain powers unique to governmental entities, such as the authority to exercise the power of eminent domain in the name of the United States." *Baker v. Runyon,* 114 F.3d 668, 670-71 (7th Cir. 1997) (citing 39 U.S.C. §§ 201, 1001(b) & 401(9)). The "sue and be sued" provision, if anything, indicates that "waiver of sovereign immunity is necessary solely because the Postal Service is a government agency." *Id.* (citing *Western Sec. Co. v. Derwinski,* 937 F.2d 1276, 1280 (7th Cir. 1991) (stating that the "sue or be sued" clause "permit[s] the suit to go forward notwithstanding that it is a suit against a federal agency")); *see also United States Postal Serv. v. Flamingo Indus. (USA) Ltd.,* 540 U.S. 736, 744 (2004) ("While Congress waived the immunity of the Postal Service, Congress did not strip it of its governmental status."). Accordingly, we conclude that the district court did not abuse its discretion in concluding that the use of collateral estoppel was not appropriate in this case, and, thus, the Postal Service may argue that the National Agreement incorporates the postal handbooks and manuals that relate to employees' return to work.

2. Incorporation

The premise underlying the Postal Service's position in this case is that the National Agreement incorporates by reference the regulations in the postal handbooks and manuals that govern an employee's return to work after taking leave for a serious health condition. The Postal Service relies upon Article 19 of the agreement, which reads:

> Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's instructions.

R.27, Ex.I, Ex.1 at 123.

Mr. Harrell argues that this paragraph is too vague and general to incorporate the contents of the postal handbooks and manuals into the collective bargaining agreement. He also relies on the declaration of Greg Bell, the director of industrial relations for the APWU, who attests that the postal handbooks and manuals are not part of the National Agreement because they were promulgated unilaterally by the Postal Service, rather than through any collective bargaining between the Postal Service and the APWU. *See* R.27, Ex.I at ¶ 10.

Other courts of appeals, by contrast, have concluded in analogous contexts that the provisions contained in the

postal handbooks and manuals that affect working conditions are incorporated by reference into the National Agreement. *See Woodman v. Runyon,* 132 F.3d 1330, 1334 (10th Cir. 1997) (noting that the postal manual governing injury compensation was part of the National Agreement because "Article 19 . . . incorporates those parts of all USPS handbooks, manuals and published regulations which directly relate to wages, hours, or working conditions"); *Kroll v. United States,* 58 F.3d 1087, 1091 (6th Cir. 1995) (concluding that Postal Service employee suggestion program was incorporated into the National Agreement through the postal manual because Article 19 "incorporates by reference all parts of postal handbooks, manuals, and regulations that 'directly relate to wages, hours, or working conditions' ").

Indeed, the APWU itself has argued in other litigation that Article 19 incorporates the postal handbooks and manuals into the National Agreement. For instance, in *United States Postal Service v. American Postal Workers Union,* 922 F.2d 256 (5th Cir. 1991), the Fifth Circuit noted that,

> [a]lthough article 19 states that nothing in the handbooks, manuals and regulations shall conflict with the Agreement, it does not specifically state that the Agreement incorporates these texts. Thomas A. Neill, Director of Industrial Relations for the APWU, whose duties include negotiation of the National Agreement and administration of the grievance procedure, states in his "declaration" that "[t]he handbooks and manuals are applied in labor relations between the APWU and USPS as part of the National Agreement." These texts, Neill adds, are incorporated by reference into the Agreement and arbitrators

> routinely interpret them in deciding grievance arbitration cases. The Postal Service does not dispute Neill's sworn declaration.

Id. at 259 n.2.

In light of the fact that both parties to the National Agreement have maintained previously that the postal handbooks and manual affecting working conditions are incorporated by reference into that agreement, Mr. Harrell stands in a weak position to assert otherwise. We agree with our sister circuits that Article 19 is sufficient to incorporate the postal handbooks and manuals relating to wages, hours or working conditions into the National Agreement. Certainly, the postal handbooks and manuals that govern an employee's return to work after an extended absence relate to wages, hours or working conditions.

3. Diminishment of FMLA Rights

Mr. Harrell next contends that, even if the postal return-to-work regulations are part of a valid collective bargaining agreement, the Postal Service was not allowed to impose any condition on his return that is more stringent than what is specifically allowed by the FMLA, and, by doing so, the Postal Service violated rights protected by the FMLA. The Postal Service takes the opposite view. It maintains that the FMLA allows for a more stringent return-to-work certification if required by state law or if set forth in a CBA. Thus we arrive at the pivotal issue in this case: Whether the Postal Service can rely upon return-to-work regulations incorporated into a valid collective bargaining agreement to impose requirements on employees that are more burdensome than what is set

forth in the statute. To resolve this issue, we begin with the language of the statute, specifically 29 U.S.C. §§ 2614(a)(4) and 2652. If the intent of Congress, as expressed in the language of the statute, is clear with respect to this issue, then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). However, "if the statute is silent or ambiguous with respect to the specific issue," the court must defer to the agency's answer if it "is based on a permissible construction of the statute." *Id.* at 843. Generally speaking, an agency's interpretation of a statute that it administers is "permissible" if it is "reasonable." *Id.* at 845.

Section 2614(a)(4) permits employers to impose, as a condition of returning to work,

> a uniformly applied practice or policy that requires each employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

29 U.S.C. § 2614(a)(4). The legislative history for this section notes that the last phrase "clarifies that [§ 2614(a)(4)] was not meant to supersede other valid State or local laws or collective bargaining agreement that, for reasons such as public health, might affect the medical certification required for the return to work of an employee who had been on medical leave." S. Rep. 103-3 at 32.

Section 2652, in turn, reads:

> (a) More protective
>
> Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.
>
> (b) Less protective
>
> The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

29 U.S.C. § 2652. The legislative history to this section adds that "[subsection (a)] specifies that employees must continue to comply with collective bargaining agreements or employment benefit plans providing greater benefits than the act. Conversely, [subsection (b)] makes clear that rights under the act cannot be taken away to collective bargaining or employer plans." S. Rep. 103-3 at 38; *see also id.* at 47 (explaining that under § 2652 nothing in the FMLA "shall diminish an employer's obligation under a collective bargaining agreement or employment benefit plan to provide greater leave rights nor may the rights provided under this title be diminished by such agreement or plan").

As noted above, Mr. Harrell believes that the Postal Service's insistence on a detailed return-to-work statement violated the FMLA. He asserts that, although the Postal

Service was allowed to have a uniform fitness certification policy under 29 U.S.C. § 2614(a)(4), this provision is limited by the language of 29 U.S.C. § 2652(b) which provides that "[t]he rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan." Therefore, as these provisions apply to his case, Mr. Harrell submits that, because Dr. Smith cleared him for work without restrictions, the Postal Service was not authorized to impose a more stringent certification requirement, even if such a requirement was part of the governing collective bargaining agreement.

The Postal Service and the Department of Labor urge a different interpretation of these provisions. They maintain that § 2614(a)(4), with its deference to "a valid State or local law or a collective bargaining agreement," defines the "right" to return to work as guaranteed by the FMLA. The Postal Service goes on to explain that,

> [b]ecause an employee has no right under the Act to circumvent a collective bargaining provision governing his return to work, applying section 2614 to require additional certification measures does not "diminish" any "right established for employees under th[e] Act," and therefore does not contravene section 2652.

Rehearing Pet. at 11.

Both parties urge that we need not look beyond the statutory language to resolve the question at hand – whether a CBA can impose a more stringent return-to-work requirement than a simple certification by the employee's own physician. We do not believe this to be the

case. Here, § 2614 provides that an employer may have a certification requirement, but further provides that "nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees"; § 2652 states that nothing in the Act "shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement . . . that provides greater family or medical leave rights to employees than the rights established under this Act" and further states that rights provided by the FMLA "shall not be diminished by any collective bargaining agreement or any employment benefit program or plan."

There are two possible ways to reconcile these provisions. The first is the interpretation urged by Mr. Harrell – that a CBA can provide greater, but not fewer, rights to employees. This interpretation, however, renders the last clause of § 2614(a)(4) superfluous, a result that we usually try to avoid. *See, e.g., United States v. Alvarenga-Silva,* 324 F.3d 884, 887 (7th Cir. 2003) ("Courts should avoid statutory constructions that render another part of the same provision superfluous."). The second possible interpretation – the one urged by the Postal Service – is to read § 2614(a)(4) as an exception to the general rule set forth in § 2652. Such a reading is consonant with general canons of statutory interpretation, *see United States v. Salerno,* 108 F.3d 730, 737 (7th Cir. 1997) (describing the "cannon [sic] of statutory interpretation that a more specific statutory provision takes precedence over a more general provision"); however, Congress' intent to limit the operation of § 2652 with respect to return-to-work provisions could have been made clearer through the use of a cross-reference to § 2614(a)(4). Given the short-comings with

each interpretation, we are not able to conclude that Congress *clearly* addressed the question at issue through the statutory language. We therefore may turn to the interpretive regulations to resolve the issue.

Chevron instructs that we must defer to the reasonable interpretation of an agency tasked with administering the statute. Whether an interpretation is reasonable involves a two-step inquiry. The first step requires that the court identify the agency's position on the specific issue. The second step requires a determination of whether the agency's position is a principled one. *Chevron,* 467 U.S. at 844.

Here, Mr. Harrell maintains that the interpretation of § 2614(a)(4) set forth in the Department of Labor's regulation is no more than a restatement of the language of the statute and, therefore, is not worthy of deference. Although such an argument does find support in recent Supreme Court case law,[3] we find it unpersuasive with respect to the regulation at issue. It is true that part of the implementing regulation, 29 C.F.R. § 825.310,[4] follows closely the language of the statute; however, the regulation goes beyond the mere recitation of the statutory language and speaks to the issue presented in this case. First, the title of the regulation sets forth the question that the regulation purports to answer: "Under what

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[3] *See Gonzales v. Oregon*, 126 S. Ct. 904, 915 (2006) (rejecting the Government's argument that an interpretive rule was worthy of deference under *Auer v. Robbins*, 519 U.S. 452 (1997), in part because "the underlying regulation does little more than restate the terms of the statute itself").

[4] The relevant sections of 29 C.F.R. § 825.310 are set forth supra at 13.

circumstances may an employer require that an employee submit a medical certification that the employee is able (or unable) to return to work (i.e., a 'fitness-for-duty' report)?" 29 C.F.R. § 825.310. Subsection (a) then states the general proposition that, as a condition of restoring an employee to his or her position after FMLA leave, "an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees . . . who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work." 29 C.F.R. § 825.310(a). Subsection (b) speaks more directly to the situation presented here; it states:

> (b) *If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied.* Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

29 C.F.R. § 825.310(b) (emphasis added). Not only does subsection (b) clearly state that a CBA takes precedence over the statutory requirements, the examples that follow illustrate that the Department of Labor does not believe

that return-to-work requirements found in a CBA only can provide employees with greater protections than the statutory language. The last example discussing the warehouse laborer is particularly telling: A CBA that provided only greater rights to employees could not require a warehouse laborer, as a condition of returning to work, to be examined by an orthopedist; if the employee had obtained a return-to-work release from his general practitioner, that release, without more, would suffice under the statutory provisions of the FMLA. Thus subsection (b) not only provides for compliance with a CBA, it also indicates that the CBA may impose more stringent return-to-work requirements on the employee than those set forth in the statute.[5]

Having identified the agency's answer to the question,[6] the last inquiry is whether this interpretation is a

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[5] Subsection (c) then goes on to describe the statutory protections set forth in the act for returning to work – those protections that are applied in the event subsection (b) is inapplicable. *See* 29 C.F.R. § 825.310(c), supra at 13.

[6] A Department of Labor Opinion Letter, Opinion Letter FMLA-113, further elucidates the Department's position vis-a-vis CBAs and establishes that the Department's position has remained consistent over time. The letter states:

> How FMLA's certification provisions interact with the terms of a CBA that govern an employee's reinstatement is specifically discussed in § 825.310(b) of the regulations. If the terms of the CBA, for instance, require a fitness-for-duty examination in addition to a return-to-work certification, then those terms apply with certain conditions. The FMLA, which has adopted the guidelines of the Americans with Disabilities Act (ADA), requires that any fitness-for-duty examination as a condition for returning to work must be job-related and consistent with business necessity.
>
> . . . If the above-referenced return-to-work medical certification and fitness-for-duty examinations provisions in

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reasonable one and, as a result, is entitled to deference from the courts. We believe that this final requirement also is met. First, there is support in the legislative history for this interpretation. As noted above, the portion of the Senate report that discusses § 2614(a)(4) states that the language of § 2614(a)(4)

> clarifies that section 104(a)(4) was not meant to supersede other valid State or local laws or collective bargaining agreement, that, for reasons such as public health, might affect the medical certification required for the return to work of an employee who had been on medical leave. For example, section 104(a)(4) does not supersede a State law that requires specific medical certification before the return to work of employees who have had a particular illness and who have direct contact with the public . . . .

S. Rep. 103-3, at 31 (1993). Additionally, the Department's interpretation avoids a construction of the statute that would render the last clause of § 2614(a)(4) superfluous. If that clause were interpreted to give CBA's precedence over the statutory protections only if those protections were greater than that provided in the Act, then § 2614(a)(4) and § 2652 would provide the same guarantees. Finally,

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> the handbook and manual are a part of the CBA as you have asked that we assume, then these provisions would apply instead of the FMLA's return-to-work certification requirements. . . .

Opinion Letter, FMLA-113 (September 11, 2000). Thus, the Department of Labor consistently has taken the position that § 2614(a)(4) means that return-to-work provisions set forth in a CBA, whether providing greater or fewer protections to employees than are explicitly set forth in the FMLA, take precedence over the statutory protections provided to employees in the Act.

the Department's interpretation of § 2614 gives effect to the rule of statutory construction that specific provisions take precedence over more general provisions. Section 2652 speaks in broad terms to the protections provided to employees by the Act; § 2614(a)(4), however, addresses a very specific issue – return-to-work certifications. Thus, with respect to the specific right to which § 2614(a)(4) is addressed – returning to work upon the certification of a physician – a CBA, state statute or local ordinance, may take precedence over the statutory protections provided by other places in the Act.[7]

Because the Department of Labor's regulations reasonably interpret § 2614(a)(4) to allow a CBA to impose stricter return-to-work restrictions than those otherwise incorporated into the FMLA, we defer to that interpretation and hold that the Postal Service did not violate the FMLA when it required Mr. Harrell to comply with the return-to-work provisions set forth in the handbooks and manuals incorporated into the National Agreement.[8]

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[7] Mr. Harrell cites two district court opinions, *Marrero v. Camden County Board of Social Services*, 164 F. Supp. 2d 455 (D.N.J. 2001), and *Routes v. Henderson*, 58 F. Supp. 2d 959 (S.D. Ind. 1999), that reach a different conclusion. For the reasons set forth in this section, we respectfully disagree with those courts.

[8] Mr. Harrell also argues that the Postal Service violated its own regulations when it required that he undergo an examination by a designated physician. He claims that the return-to-work requirements do not specifically reference the portion of the employee manual dedicated to FMLA leave, and, therefore, those requirements are not meant to apply to the FMLA section. We find this argument unpersuasive. Nothing in the language of the statute or regulation suggests that a CBA's return-to-work provisions must specifically reference the FMLA or cross-reference the section of the CBA dedicated to implementing the FMLA in order to be effective.

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C. Contacting Employee's Health Care Provider

Despite Mr. Harrell's express refusal to give his consent, the postal nurse contacted his personal physician and requested additional medical information. The district court determined that this contact violated the FMLA, as provided in the statute's accompanying regulations:

> If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employer's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

29 C.F.R. § 825.307(a).

The rights established by the FMLA can be enforced through civil actions. Section 2615 makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided." 29 U.S.C. § 2615(a)(1). An employer who violates this section shall be "liable to any eligible employee affected" for compensatory damages and "for such equitable relief as may be appropriate, including employment, reinstate-

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Mr. Harrell also points to statements by Postal Service administrators, regarding the requirements for returning to work after FMLA leave, made several years prior to Mr. Harrell's illness and attempted return-to-work. However, Mr. Harrell failed to establish either that these statements represented the current administrative practice under the existing CBA or Employee Labor Relations Manual, or that he relied upon these statements in refusing to undergo an examination by the Postal Service physician.

ment, and promotion." *Id.* § 2617(a)(1).[9] The district court ruled that Mr. Harrell was not entitled to any damages on

[9] The full text of § 2617(a)(1) reads:

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected –

(A) for damages equal to –

(i) the amount of –

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee; (ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

29 U.S.C. § 2617(a)(1).

this claim because the violation caused him no injury: Dr. Smith's office refused to release any medical information to the postal nurse absent Mr. Harrell's consent. This conclusion is correct. Our review of the record also found no indication that any information obtained from the postal nurse's contact with Dr. Smith's office in any way compromised Mr. Harrell's return-to-work status or was a factor in the Postal Service's decision to terminate his employment. Section 2617 affords

> no relief unless the employee has been prejudiced by the violation: The employer is liable only for compensation and benefits lost "by reason of the violation," § 2617(a)(1)(A)(i)(I), for other monetary losses sustained "as a direct result of the violation," § 2617(a)(1)(A)(i)(II), and for "appropriate" equitable relief, including employment, reinstatement, and promotion, § 2617(a)(1)(B). The remedy is tailored to the harm suffered.

Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 88-90 (2002).[10] Because Mr. Harrell was not harmed by the unauthorized contact with his physician, § 2617 provides him no remedy, including equitable relief, and the district

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[10] *See also Cianci v. Pettibone Corp.*, 152 F.3d 723, 728-29 (7th Cir. 1998) (holding that plaintiff had no claim under FMLA because she had suffered no diminution in income and incurred no costs as a result of alleged violation); *see also Cavin v. Honda of America Mfg., Inc.*, 346 F.3d 713, 726 (6th Cir. 2003) ("Even when an employee proves that his employer violated § 2615, '§ 2617 provides no relief unless the employee has been prejudiced by the violation' ") (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 88-90 (2002)); *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 162 (2d Cir. 1999) (concluding that the FMLA does not give "an employee a right to sue the employer for failing to give notice of the terms of the Act where the lack of notice had no effect on the employee's exercise of or attempt to exercise any substantive right conferred by the Act").

court correctly granted the Postal Service summary judgment on this claim.

D. Notice Requirements

Finally, Mr. Harrell alleges that the Postal Service interfered with his FMLA rights by failing to provide him with timely and sufficient notice of the requirements for returning to work and of the consequences for failing to comply with those requirements. The Act's implementing regulations require that an employer must provide notice "detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations," 29 C.F.R. § 825.301(b), "within a reasonable time after notice of the need for leave is given by the employee – within one or two business days if feasible," *id.* § 825.301(c). If the employer fails to provide adequate and timely notice, it "may not take action against an employee for failure to comply with any provision required to be set forth in the notice." *Id.* § 825.301(f).

The district court concluded that Mr. Harrell's claim was "belied by his deposition testimony in which he admits that he was aware of the USPS regulations concerning returning to work following an absence of more than 21 days." R.41 at 11. The court found, moreover, that, upon realizing that Mr. Harrell's leave would exceed twenty-one days, Cussins mailed to him a letter outlining in detail the return-to-work certification requirements. In addition, Mr. Harrell discussed his alternatives with Cussins when he first had attempted to return to work.

Mr. Harrell contends that the Postal Service was required to inform him of his return-to-work obligations at the time he requested FMLA leave, not at the time he

attempted to return to work. On February 2, and again on February 23, 2000, Mr. Harrell notified his supervisors that he might be absent for up to four weeks. The Postal Service initially advised him of its return-to-work requirements by letter dated February 23, 2000. Although, according to Mr. Harrell, he did not receive this letter until March 7 (the day after he attempted to return to work), nothing in the record suggests that the Postal Service delayed in attempting to notify Mr. Harrell of his obligations within a reasonable time after he advised the Postal Service that he needed to take an extended absence.

Furthermore, even assuming that the Postal Service failed to provide adequate notice, Mr. Harrell was not harmed by this violation. On March 6, 2000, when Mr. Harrell attempted to return to work, he was told by Cussins what he needed to do in order to be cleared for work. By letters dated March 9 and March 15, 2000, the Postal Service reiterated to Mr. Harrell his return-to-work obligations and told him that he would be subject to removal if he failed to comply with those conditions. Then, when Mr. Harrell responded by letter on March 21, the Postal Service sent him another letter requesting an opportunity to review medical documentation from his health care provider and scheduling an appointment for him to be examined by a USPS-contract physician. Mr. Harrell again refused this request. The Postal Service did not terminate his employment until April 27, 2000.

This chronology demonstrates that Mr. Harrell had ample notice of the Postal Service's expectations and of his obligations related to returning to work. We conclude that, on this record, the district court's grant of summary judgment in favor of the Postal Service was appropriate on this claim.

Conclusion

Accordingly, for the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States of Appeals for the Seventh Circuit

445 F.3d 913

In the
United States Court of Appeals
For the Seventh Circuit

No. 03-4204

RODNEY HARRELL,

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois
No. 02 C 2056 – **Michael P. McCuskey**, *Chief Judge*.

ARGUED SEPTEMBER 24, 2004 – DECIDED JULY 19, 2005

Before FLAUM, Chief Judge, and RIPPLE and WILLIAMS, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Rodney Harrell filed this action against his former employer, the United States Postal Service ("USPS" or "Postal Service"), alleging violations of the Family Medical Leave Act ("FMLA" or "Act"), 29 U.S.C. § 2601 *et seq.* The parties filed cross-motions for summary judgment, and the district court granted summary judgment in favor of the Postal Service. Mr. Harrell has appealed. For the reasons set forth in the following

opinion, we affirm in part and reverse in part the judgment of the district court and remand for further proceedings.

I

BACKGROUND

A. Facts

Mr. Harrell began working for the Postal Service in 1984 as a clerk at the Decatur, Illinois post office. He was a member of a collective bargaining unit represented by the American Postal Workers Union, AFL-CIO ("APWU" or "Union"), and he was covered by a national collective bargaining agreement between the APWU and the Postal Service known as the National Agreement.

On February 2, 2000, Mr. Harrell felt ill and left work early. On February 10, 2000, he submitted to the Postal Service a medical form completed by his physician, Dr. Robert Smith, which certified that his absence was due to fatigue, stress, sleep disturbance and difficulty concentrating. Dr. Smith indicated that the health problems had begun on February 2 and probably would last four weeks. On February 23, 2000, Mr. Harrell submitted a second health certification, in which Dr. Smith estimated that he would be able to resume work on March 6, 2000.

The Postal Service responded by a letter dated February 23, 2000, and advised Mr. Harrell that, according to postal regulations, in order to return to work,

> (1) You must submit medical documentation outlining the nature and treatment of the illness or injury, the inclusive dates you were unable to work, and any medicines you are taking. This

> medical information is to be reviewed by the Postal Medical Officer.
>
> (2) You may be required to be examined by the Postal Medical Officer after your documentation is reviewed. The bill for this release for work exam will be paid by the Postal Service.

R.27, Ex.A, Ex.3. Mr. Harrell maintains that he did not receive this letter until March 7, 2000.

Mr. Harrell attempted to return to his job on March 6. However, Jane Cussins, the Decatur post office supervisor, informed him that he had not been cleared to return to work; at that time she explained the applicable postal regulations to Mr. Harrell. In order to facilitate the clearance process, Cussins made him an appointment for an examination by the USPS-contract physician for later that morning. Mr. Harrell went to the physician's office, but he refused to consent to an examination because he believed that he already had provided the Postal Service with sufficient medical information to entitle him, under the FMLA, to return to work. Mr. Harrell returned to Cussins' office, and she told him that she would fax the documentation submitted by Mr. Harrell to the postal nurse for review.

The postal nurse reviewed the February 10 and February 23 certifications submitted by Mr. Harrell, and she concluded that the information was insufficient to clear him for duty. Specifically, the forms had no information about continuing medications, restrictions on Mr. Harrell's ability to work or when he had been declared fit to return to work. On March 10, 2000, the postal nurse called Mr. Harrell to obtain his physician's contact information; he refused to provide the information and expressly

stated that he did not want her to contact his physician. Two weeks later, nonetheless, the postal nurse faxed a return-to-work form to Dr. Smith's office. The office refused to release any medical information without Mr. Harrell's consent.

In the meantime, the Postal Service mailed Mr. Harrell a letter dated March 9, 2000, reminding him that

> employees returning to duty after 21 days or more of absence due to illness or serious injury require medical certification. This certification must include evidence of your ability to return to work, with or without limitations. A medical officer or contract physician evaluates the medical report and makes a medical assessment as to your ability to return to work before you are allowed to return.

R.27, Ex.A, Ex.5. The letter also explained that the forms prepared by Dr. Smith, which had explained Mr. Harrell's need for leave, were insufficient to clear him for duty because they did not describe the nature of treatment he received or list any medications he was taking. Finally, the letter advised that, if he did not present appropriate documentation within five days, he would be considered absent without leave and subject to discipline, including removal. This letter was sent by both regular and certified mail.

On March 15, 2000, having not received a reply from Mr. Harrell, the Postal Service mailed him another letter (also via regular and certified mail) which declared him absent without leave and scheduled a predisciplinary hearing for March 17. The letter advised that failure to appear could result in disciplinary action, including

removal. On March 22, the Postal Service sent Mr. Harrell a notice of removal.

On March 21, 2000, Mr. Harrell sent a letter to the Postal Service. He maintained that he had not received the March 9 and March 15 warning letters until March 20. He also asserted that the medical documentation he had provided in order to qualify his absence as FMLA leave was sufficient by law to entitle him to return to work. Despite this belief, Mr. Harrell returned to Dr. Smith and obtained a return-to-work certification. The certification, dated March 23, 2000, stated that Mr. Harrell was "fit to return to work without restrictions." R.27, Ex.A, Ex.7.

The Postal Service responded to Mr. Harrell by letter on March 31, 2000, which advised:

> You were notified in writing on February 23, 2000, that this medical documentation had to include the nature of treatment of your illness and any medicines you were taking. You have again failed to provide medical documentation adequate for the Postal Medical Officer to make a determination as to your ability to return to work.
>
> In conclusion, we want the opportunity to review medical documentation from your attending physician that includes all the required information. We have scheduled the following appointment for you to be examined by the Postal contract physician.

R.22, Ex.6, Ex.10. Mr. Harrell again refused to provide further information or to submit to an examination. By letter dated April 27, 2000, the Postal Service terminated his employment.

B. District Court Proceedings

Mr. Harrell alleged that the Postal Service violated the FMLA in five ways: (1) failing to restore him to work after he presented a medical clearance; (2) requiring him to submit to a medical examination by a USPS-contract physician prior to allowing him to return to work; (3) terminating his employment because he took FMLA leave; (4) contacting his physician without his consent; and (5) failing to provide him with notice of the Postal Service's return-to-work requirements and the consequences of not complying with those requirements. The parties filed cross-motions for summary judgment, and the district court granted summary judgment in favor of the Postal Service.

1.

With respect to Mr. Harrell's first three claims, the Postal Service asserted that the conditions it had placed on his return to work were permitted by the National Agreement that incorporated by reference the postal handbooks and manuals governing employees' leave. Specifically, the Postal Service contended that any return-to-work certification requirements included in a collective bargaining agreement take precedence over the FMLA's return-to-work provisions under 29 U.S.C. § 2614(a)(4), which provides that employers may impose

> a uniformly applied practice or policy that requires each employee to receive certification from the health care provider of the employee that the employee is able to resume work, *except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining*

> *agreement that governs the return to work of such employees.*

Id. (emphasis added).

Mr. Harrell contended that the Postal Service was precluded from arguing that the National Agreement incorporated the postal regulations governing return to work after FMLA leave because the Postal Service previously made, and lost, the same argument in a different case. The district court, however, determined that *United States v. Mendoza,* 464 U.S. 154, 162 (1984), did not allow Mr. Harrell to invoke the doctrine of collateral estoppel offensively against the United States based on a litigation to which he was not a party.

The district court then concluded that the postal handbooks and manuals are part of the National Agreement. It further determined that, because the postal regulations had the force of a valid collective bargaining agreement, those regulations, and not the FMLA's provisions, controlled Mr. Harrell's right to reinstatement. In addition, the district court found that the postal regulations justified the Postal Service's requirement that Mr. Harrell provide more detailed medical documentation from his health care provider or submit to a medical examination by a USPS-contract physician. Moreover, the district court believed that such requirements did not diminish any substantive right provided by the FMLA. The court took the view that

> USPS employees always have the right guaranteed by the FMLA to be restored to their employment following FMLA leave. The agreement and the USPS regulations merely alter the procedure by which employees go about being restored.

> It is possible to imagine a situation in which altering the procedure attached to a certain substantive right would in essence impinge on or prohibit the exercise of that right. This case does not present such a situation, however, given the modest and seemingly simple certification process the USPS imposes for employees who exceed 21 days of FMLA leave. Cussins was able to make Harrell an appointment with the contract doctor on the very morning he sought to return to work. Alternatively, the [postal nurse] needed only two single-sided forms filled out by a doctor, noting Harrell's condition, treatment, medication, and work restrictions. Neither process is so onerous that it effectively abrogates Harrell's right of restoration under the FMLA.

R.41 at 9.

2.

Next, the district court granted the Postal Service summary judgment on the claim that it had failed to provide Mr. Harrell with adequate notice of the requirements for returning to work and of the consequences for not meeting those requirements. *See* 29 C.F.R. § 825.310(c). The district court pointed to Mr. Harrell's "deposition testimony in which he admits that he was aware of the USPS regulations concerning returning to work following an absence of more than 21 days." R.41 at 11. The court noted, moreover, that Mr. Harrell was informed of the return-to-work requirements by the letters from the Postal Service and by Cussins, to whom he had spoken when he attempted to return to work.

3.

Finally, the district court granted the Postal Service summary judgment on Mr. Harrell's claim that the Postal Service had violated the FMLA by contacting his personal physician without his consent. *See* 29 C.F.R. § 825.310(c). Although the district court found that a violation had occurred, it dismissed the claim because Mr. Harrell had suffered no injury in that Dr. Smith's office did not release any information that contributed to his termination.

II

DISCUSSION

A. Standard of Review

We review a district court's grant or denial of summary judgment de novo. *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir. 2000). In doing so, we construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Id.* Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

B. Failure to Return to Work

Congress enacted the FMLA in order to assist workers in meeting the needs of their families and the demands of their jobs. *See Price v. City of Fort Wayne*, 117 F.3d 1022, 1023 (7th Cir. 1997). The statute responded to the perception that

> [p]rivate sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to impose a heavy burden on families, employees, employers and the broader society. [This legislation] provides a sensible response to the growing conflict between work and family by establishing a right to unpaid family and medical leave for all workers covered under the act.

S. Rep. No. 103-3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2, 6 ("S. Rep. 103-3"). The FMLA makes available to eligible employees up to twelve weeks of leave during any twelve-month period for one or more of the following reasons: (1) the birth of the employee's child; (2) the placement of a child with the employee for adoption or foster care; (3) the care of the employee's child, spouse or parent who has a serious health condition; and (4) the inability of the employee himself to perform the functions of his position because of a serious health condition. 29 U.S.C. § 2612(a)(1). At the conclusion of a qualified-leave period, the employee is entitled to return to his former position of employment, or to an equivalent one, with the same terms and benefits. *Id.* § 2614(a)(1);[1] *see also* 29

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[1] Section 2614(a)(1) provides:

> (1) In general
>
> Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave –
>
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(Continued on following page)

C.F.R. § 825.214(a). To protect these rights, the FMLA declares it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided." 29 U.S.C. § 2615(a)(1). In this case, Mr. Harrell contends that the Postal Service violated his rights under the FMLA by refusing to return him to his position after his physician provided an unqualified certification of his fitness to return to duty.

An employee's right to return to work after taking FMLA leave is not unlimited. The Act seeks to accomplish its purposes "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(3); *see also* 29 C.F.R. § 825.101(b) ("The enactment of the FMLA was predicated on two fundamental concerns – the needs of the American workforce, and the development of high-performance organizations."). An employee is not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." 29 U.S.C. § 2614(a)(3)(B); *see also* 29 C.F.R. § 825.216(a) ("An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period."). An employee returning from FMLA leave also is not entitled to restoration if he

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(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. § 2614(a)(1).

cannot perform the essential functions of the position or an equivalent position.[2] 29 C.F.R. § 825.214(b).

In addition, the Act permits an employer, as a condition of restoring employees who take FMLA leave, to have a policy that requires all such employees to obtain medical certification from their personal health care provider indicating that the employee is able to resume work. 29 U.S.C. § 2614(a)(4). The Act provides that nothing in § 2614(a)(4) "shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of employees." *Id.* The interplay between the FMLA's return-to-work provisions and a collective bargaining agreement that governs the return of employees who take leave due to a serious health condition is discussed in the statute's accompanying regulations:

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[2] The Department of Labor regulations discuss an employee's right to restoration:

> (a) On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* § 825.106(e) for the obligations of joint employers.
>
> (b) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act (ADA). *See* § 825.702.

29 C.F.R. § 825.214.

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. . . .

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

29 C.F.R. § 825.310(a)-(c).

In the present case, the Postal Service maintains that it had the right, under the FMLA, to require Mr. Harrell to provide sufficient medical documentation from his health care provider or to be cleared for duty by a USPS-contract physician, as a condition of returning to work. In the Postal Service's view it appropriately employed, under 29 U.S.C. § 2614(a)(4), a uniform practice requiring employees to provide a fitness-for-duty certification from their personal health care provider; and, although the accompanying regulations provide that this certification need only be a simple statement of the employee's ability to work, *see* 29 C.F.R. § 825.310(c), the FMLA's certification provisions do not supersede a valid collective bargaining agreement that governs return to work for such employees, *see* 29 U.S.C. § 2614(a)(4); 29 C.F.R. § 825.310(b).

Mr. Harrell challenges this theory on four grounds: (1) collateral estoppel forecloses the Postal Service from arguing that the terms of the National Agreement allow it to limit postal employees' right to return to work after FMLA leave; (2) the postal handbooks and manuals are not part of the National Agreement; (3) the postal return-to-work provisions are invalid because they diminish a substantive right afforded by the FMLA; and (4) the requirements imposed by the Postal Service in this case contravened the postal return-to-work provisions. We shall address these issues in turn.

1. Collateral Estoppel

Mr. Harrell first contends that the Postal Service is precluded from arguing that its handbooks and manuals are negotiated parts of the National Agreement because it raised and lost this argument in *Routes v. Henderson,* 58

F. Supp. 2d 959, 994 (S.D. Ind. 1999). The doctrine of collateral estoppel provides that "once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation." *Mendoza,* 464 U.S. at 158. The "offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party." *Id.* at 159 n.4. Mr. Harrell seeks to invoke nonmutual collateral estoppel, which occurs when the plaintiff was a nonparty to the prior lawsuit. *Id.* The district court determined that applying this doctrine against the Postal Service was not appropriate. We review a district court's decision whether to apply offensive collateral estoppel for an abuse of discretion. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 331 (1979).

As the district court recognized, the Supreme Court has established that nonmutual offensive collateral estoppel does not extend to litigation against the United States. *Mendoza,* 464 U.S. at 162. The United States differs from private litigants in that its litigation is geographically broad and often involves issues of national significance. *Id.* at 159-60. Among other concerns expressed by the Court, precluding the United States from relitigating issues against different parties would "thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue" and would "deprive th[e] Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before" it grants certiorari. *Id.* at 160.

Mr. Harrell submits that *Mendoza* does not apply in this case because Congress has placed the Postal Service on the same footing as a private litigant by authorizing it to "sue and be sued." 39 U.S.C. § 401. Mr. Harrell reads too much into this waiver of immunity: That the Postal Service is amenable to the judicial process does not "change the fact that the party being sued is still the federal government." *In re Young*, 869 F.2d 158, 159 (2d Cir. 1989) (per curiam). Indeed, Congress has provided that the Postal Service "is part of the executive branch of government, that its employees are part of the federal civil service, and that it possesses certain powers unique to governmental entities, such as the authority to exercise the power of eminent domain in the name of the United States." *Baker v. Runyon*, 114 F.3d 668, 670-71 (7th Cir. 1997) (citing 39 U.S.C. §§ 201, 1001(b) & 401(9)). The "sue and be sued" provision, if anything, indicates that "waiver of sovereign immunity is necessary solely because the Postal Service is a government agency." *Id.* (citing *Western Sec. Co. v. Derwinski*, 937 F.2d 1276, 1280 (7th Cir. 1991) (stating that the "sue or be sued" clause "permit[s] the suit to go forward notwithstanding that it is a suit against a federal agency")); *see also United States Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744 (2004) ("While Congress waived the immunity of the Postal Service, Congress did not strip it of its governmental status."). Accordingly, we conclude that the district court did not abuse its discretion in concluding that the use of collateral estoppel was not appropriate in this case, and, thus, the Postal Service may argue that the National Agreement incorporates the postal handbooks and manuals that relate to employees' return to work.

2. Incorporation

The premise underlying the Postal Service's position in this case is that the National Agreement incorporates by reference the regulations in the postal handbooks and manuals that govern an employee's return to work after taking leave for a serious health condition. The Postal Service relies upon Article 19 of the agreement, which reads:

> Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's instructions.

R.27, Ex.1, Ex.1 at 123.

Mr. Harrell argues that this paragraph is too vague and general to incorporate the contents of the postal handbooks and manuals into the collective bargaining agreement. He also relies on the declaration of Greg Bell, the director of industrial relations for the APWU, who attests that the postal handbooks and manuals are not part of the National Agreement because they were promulgated unilaterally by the Postal Service, rather than through any collective bargaining between the Postal Service and the APWU. *See* R.27, Ex.1 at ¶ 10.

Other courts of appeals, by contrast, have concluded in analogous contexts that the provisions contained in the

postal handbooks and manuals that affect working conditions are incorporated by reference into the National Agreement. *See Woodman v. Runyon,* 132 F.3d 1330, 1334 (10th Cir. 1997) (noting that the postal manual governing injury compensation was part of the National Agreement because "Article 19 . . . incorporates those parts of all USPS handbooks, manuals and published regulations which directly relate to wages, hours, or working conditions"); *Kroll v. United States,* 58 F.3d 1087, 1091 (6th Cir. 1995) (concluding that Postal Service employee suggestion program was incorporated into the National Agreement through the postal manual because Article 19 "incorporates by reference all parts of postal handbooks, manuals, and regulations that 'directly relate to wages, hours, or working conditions' ").

Indeed, the APWU itself has argued in other litigation that Article 19 incorporates the postal handbooks and manuals into the National Agreement. For instance, in *United States Postal Serv. v. American Postal Workers Union,* 922 F.2d 256 (5th Cir. 1991), the Fifth Circuit noted that,

> [a]lthough article 19 states that nothing in the handbooks, manuals and regulations shall conflict with the Agreement, it does not specifically state that the Agreement incorporates these texts. Thomas A. Neill, Director of Industrial Relations for the APWU, whose duties include negotiation of the National Agreement and administration of the grievance procedure, states in his "declaration" that "[t]he handbooks and manuals are applied in labor relations between the APWU and USPS as part of the National Agreement." These texts, Neill adds, are incorporated by reference into the Agreement and arbitrators routinely interpret

> them in deciding grievance arbitration cases. The Postal Service does not dispute Neill's sworn declaration.

Id. at 259 n.2.

In light of the fact that both parties to the National Agreement have maintained previously that the postal handbooks and manuals affecting working conditions are incorporated by reference into that agreement, Mr. Harrell stands in a weak position to assert otherwise. We agree with our sister circuits that Article 19 is sufficient to incorporate the postal handbooks and manuals relating to wages, hours or working conditions into the National Agreement. Certainly, the postal handbooks and manuals that govern an employee's return to work after an extended absence relate to wages, hours or working conditions.

3. Diminishment of FMLA Rights

Mr. Harrell next contends that, even if the postal return-to-work regulations are part of a valid collective bargaining agreement, the Postal Service was not allowed to impose any condition on his return that is more stringent than the provisions of the FMLA, and, by doing so, the Postal Service violated rights protected by the FMLA. Put another way, Mr. Harrell asserts that, although the Postal Service was allowed to have a uniform fitness certification policy under 29 U.S.C. § 2614(a)(4), this certification can be only a simple statement from the employee's health care provider that he is able to work. *See* 29 C.F.R. § 825.310(c). Mr. Harrell submits that because Dr. Smith cleared him for work without restrictions, the Postal Service was not authorized to impose a

more stringent certification requirement, even if such a requirement was part of the governing collective bargaining agreement. He contends that the Postal Service essentially wants to control the determination of whether a postal employee is fit to return to work.

This argument presents the pivotal issue in this case: whether the Postal Service can rely upon its own return-to-work regulations, as incorporated into a valid collective bargaining agreement, to impose requirements on employees that are more burdensome than what is required by the return-to-work provisions of the FMLA. To resolve this issue, we must consider the interplay between 29 U.S.C. § 2614 and § 2652. Section 2614(a)(4) permits employers to impose, as a condition of returning to work,

> a uniformly applied practice or policy that requires each employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

29 U.S.C. § 2614(a)(4). The legislative history for this section notes that the last phrase "clarifies that [§ 2614(a)(4)] was not meant to supersede other valid State or local laws or collective bargaining agreement that, for reasons such as public health, might affect the medical certification required for the return to work of an employee who had been on medical leave." S. Rep. 103-3 at 32. Although the regulations accompanying § 2614(a)(4) provide that the certification required by employers "need only be a simple statement of an employee's ability to return to work," 29 C.F.R. § 825.310(c), the regulations

also provide that, "if . . . the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied," *id.* § 825.310(b).

Section 2652, in turn, reads:

> (a) More protective
>
> Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.
>
> (b) Less protective
>
> *The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.*

29 U.S.C. § 2652 (emphasis added). The legislative history to this section adds that "[subsection (a)] specifies that employees must continue to comply with collective bargaining agreements or employment benefit plans providing greater benefits than the act. Conversely, [subsection (b)] makes clear that rights under the act cannot be taken away to collective bargaining or employer plans." S. Rep. 103-3 at 38; *see also id.* at 47 (explaining that under § 2652 nothing in the FMLA "shall diminish an employer's obligation under a collective bargaining agreement or employment benefit plan to provide greater leave rights nor may the rights provided under this title be diminished

by such agreement or plan"). The legislative history also indicates that Congress intended for the Act to

> accommodate[] the important societal interest in assisting families, by establishing a minimum labor standard for leave. The bill is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment.

Id. at 4.

To give effect to the right to take leave under the FMLA, Congress designed the statute to require employers to restore employees to work after taking such leave upon a basic showing of being able to perform their duties, which is done by a simple statement to that effect from one's own physician. The statute does indicate that the conditions by which an employee returns to work can be other than those contemplated by the statute and its implementing regulations, if those conditions are set forth in a governing collective bargaining agreement. However, any provision of a collective bargaining agreement that replaces provisions of the Act or its regulations must grant more or equal, not less, protection to the employee. This reading of the statute seems to us to be the only reasonable way to harmonize the plain wording of the two sections. We therefore cannot accept the suggestion in the Postal Service's brief that the FMLA permits an employer to follow the collective bargaining agreement, even when that agreement imposes greater burdens on employees' return to work than provided under the statute and regulations. Such a reading would give more force to the

general terms of § 2614 over the more particular terms of § 2652.[3]

We now turn to the application of this basic statutory structure to the situation before us. The district court was of the view that the statute permits the Postal Service to impose stricter return-to-work conditions than those in the FMLA so long as the conditions involve *how* an employee returns to work.[4] This distinction between substance and

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[3] *See Marrero v. Camden County Bd. of Soc. Servs.*, 164 F. Supp. 2d 455, 463 (D.N.J. 2001) (reading 29 U.S.C. § 2652(b) to invalidate employer's sick leave policy, and a governing collective bargaining agreement, to the extent they diminished the rights created by the FMLA, and stating that, "where an employer's internal policies conflict with the provisions of the FMLA, the FMLA controls and the employee need only comply with the requirements of the Act to invoke its protections"); *Routes v. Henderson*, 58 F. Supp. 2d 959, 994 (S.D. Ind. 1999) ("By expressly stating that a CBA cannot diminish the employee's FMLA rights, but can only provide greater rights, Congress clarified the expected interrelationship between a valid CBA provision and § 2614(a)(4). If the designated leave provision of the CBA were read the way the USPS asks, it would diminish the right of restoration established in the FMLA by allowing the USPS to implement its more restrictive return to work policies. Such a result would violate the FMLA.").

[4] To support its reading of 29 U.S.C. § 2614 and § 2652, the Postal Service points to an opinion letter issued by the Department of Labor on September 11, 2000, which states in part:

> As a condition of restoration, the FMLA permits an employer that has a uniformly-applied policy or practice to require all employees, or only certain employees, who take leave for their own serious health condition to provide a return-to-work certification from their health care provider. The certification need only be a simple statement of an employee's ability to work and must relate only to the particular health condition that caused the employee's need for FMLA leave. Under this provision, an employer may not impose additional requirements. These fitness-for-duty certification provisions, however, do not supersede any valid

(Continued on following page)

procedure is not a useful instrument in determining whether the conditions of reinstatement imposed by the employer are more onerous than the requirements under the FMLA. As evidenced by the statute and its accompanying regulations,[5] it is clear that such a distinction is not compatible with the statutory scheme. The true inquiry is whether the employer's requirements – whether procedural or substantive –

> State or local law or CBA that governs return to work for such employees. (*See* 29 U.S.C. § 2614(a)(4) and 29 C.F.R. § 825.310.) How FMLA's certification provisions interact with the terms of a CBA that govern an employee's reinstatement is specifically discussed in § 825.310(b) of the regulations. If the terms of the CBA, for instance, require a fitness-for-duty examination in addition to a return-to-work certification, then those terms apply with certain conditions. . . .
>
> If the . . . return-to-work medical certification and fitness-for-duty examination provisions in the [postal] handbook and manual are a part of the CBA as you have asked that we assume, then these provisions would apply instead of FMLA's return-to-work certification requirements. If these provisions are not part of the CBA, then FMLA's return-to-work certification requirements would apply.

R.27, Ex.K at 1-2; Appellee's Br. at 26-27. Notably, the Department of Labor's opinion does not consider the potential conflict between the language in 29 U.S.C. § 2614(a)(4) and 29 C.F.R. § 825.310(b) and the language in 29 U.S.C. § 2652, which is the heart of the issue before us.

[6] The Department of Labor commentary to its Final Rule, 29 C.F.R. part 825, states in part:

> FMLA provides that it shall not supersede "any provision" of any State or local law that provides greater family or medical leave "rights" than under FMLA. There is no basis under this language or the legislative history to distinguish between procedural provisions that extend greater rights to employees and substantive provisions that provide more generous family or medical leave benefits to employees.

60 Fed. Reg. 2231 (1995).

impose a greater burden on an employee than the statute and accompanying regulations.

The district court believed that a collective bargaining agreement could impose more burdensome conditions on employees. Indeed, as far as we can tell from its submissions, the Postal Service is of the view that it can impose the same fit-for-duty examination that it would require in a situation not governed by the FMLA (when, for instance, it questions whether an employee has the physical qualification to continue working). However, the provisions of the FMLA simply require an employer to rely on the evaluation of the employee's own health care provider; the return-to-work certification need not contain specific information regarding diagnosis, prognosis, treatment and medication. The Postal Service regulations, as presented to us in this litigation, impose a greater burden on the employee and therefore cannot be employed, consistent with § 2652, in implementing the return-to-work provisions of the FMLA. It is important to note, however, that nothing in the FMLA, or its implementing regulations, forbids a more stringent fit-for-duty examination once the employee has returned from FMLA leave, so long as any such examination is job-related and consistent with business necessity in accordance with Americans with Disabilities Act[6] guidelines. The FMLA and its regulations simply prevent an employer, including the Postal Service, from denying a *return* to work by an employee who has been absent on FMLA leave and who presents, upon his return, the requisite certification from his physician. If the employer has further doubts about the employee's ability

[6] 42 U.S.C. § 12101 et seq.

to do his job, it is free to address that issue after the employee is reinstated from FMLA leave.[7]

C. Contacting Employee's Health Care Provider

Despite Mr. Harrell's express refusal to give his consent, the postal nurse contacted his personal physician and requested additional medical information. The district court determined that this contact violated the FMLA, as provided in the statute's accompanying regulations:

> If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employer's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

29 C.F.R. § 825.307(a).

The rights established by the FMLA can be enforced through civil actions. Section 2615 makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided." 29 U.S.C. § 2615(a)(1). An employer who violates this section shall be "liable to any eligible employee affected" for compensatory damages and "for such equitable relief as may be appropriate, including employment, reinstatement, and

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[7] Because we have determined that the Postal Service regulations impose an impermissible burden on Mr. Harrell's FMLA rights, we need not reach his argument that the Postal Service in this case violated its own regulations.

promotion." *Id.* § 2617(a)(1).[8] The district court ruled that Mr. Harrell was not entitled to any damages on this claim

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[8] The full text of § 2617(a)(1) reads:

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected –

(A) for damages equal to –

(i) the amount of –

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

29 U.S.C. § 2617(a)(1).

because the violation caused him no injury: Dr. Smith's office refused to release any medical information to the postal nurse absent Mr. Harrell's consent. This conclusion is correct. Our review of the record also found no indication that any information obtained from the postal nurse's contact with Dr. Smith's office in any way compromised Mr. Harrell's return-to-work status or was a factor in the Postal Service's decision to terminate his employment. Section 2617 affords

> no relief unless the employee has been prejudiced by the violation: The employer is liable only for compensation and benefits lost "by reason of the violation," § 2617(a)(1)(A)(i)(I), for other monetary losses sustained "as a direct result of the violation," § 2617(a)(1)(A)(i)(II), and for "appropriate" equitable relief, including employment, reinstatement, and promotion, § 2617(a)(1)(B). The remedy is tailored to the harm suffered.

Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 88-90 (2002).[9] Because Mr. Harrell was not harmed by the unauthorized contact with his physician, § 2617 provides him no remedy, including equitable relief, and the district

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[9] *See also Cianci v. Pettibone Corp.*, 152 F.3d 723, 728-29 (7th Cir. 1998) (holding that plaintiff had no claim under FMLA because she had suffered no diminution in income and incurred no costs as a result of alleged violation); *see also Cavin v. Honda of America Mfg., Inc.*, 346 F.3d 713, 726 (6th Cir. 2003) ("Even when an employee proves that his employer violated § 2615, '§ 2617 provides no relief unless the employee has been prejudiced by the violation'") (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 88-90 (2002)); *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 162 (2d Cir. 1999) (concluding that the FMLA does not give "an employee a right to sue the employer for failing to give notice of the terms of the Act where the lack of notice had no effect on the employee's exercise of or attempt to exercise any substantive right conferred by the Act").

court correctly granted the Postal Service summary judgment on this claim.

D. Notice Requirements

Finally, Mr. Harrell alleges that the Postal Service interfered with his FMLA rights by failing to provide him with timely and sufficient notice of the requirements for returning to work and of the consequences for failing to comply with those requirements. The Act's implementing regulations require that an employer must provide notice "detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations," 29 C.F.R. § 825.301(b), "within a reasonable time after notice of the need for leave is given by the employee – within one or two business days if feasible," *id.* § 825.301(c). If the employer fails to provide adequate and timely notice, it "may not take action against an employee for failure to comply with any provision required to be set forth in the notice." *Id.* § 825.301(f).

The district court concluded that Mr. Harrell's claim was "belied by his deposition testimony in which he admits that he was aware of the USPS regulations concerning returning to work following an absence of more than 21 days." R.41 at 11. The court found, moreover, that, upon realizing that Mr. Harrell's leave would exceed twenty-one days, Cussins mailed to him a letter outlining in detail the return-to-work certification requirements. In addition, Mr. Harrell discussed his alternatives with Cussins when he first had attempted to return to work.

Mr. Harrell contends that the Postal Service was required to inform him of his return-to-work obligations at the time he requested FMLA leave, not at the time he

attempted to return to work. On February 2, and again on February 22, 2000, Mr. Harrell notified his supervisors that he might be absent for up to four weeks. The Postal Service initially advised him of its return-to-work requirements by letter dated February 23, 2000. Although, according to Mr. Harrell, he did not receive this letter until March 7 (the day after he attempted to return to work), nothing in the record suggests that the Postal Service delayed in attempting to notify Mr. Harrell of his obligations within a reasonable time after he advised the Postal Service that he needed to take an extended absence.

Furthermore, even assuming that the Postal Service failed to provide adequate notice, Mr. Harrell was not harmed by this violation. On March 6, 2000, when Mr. Harrell attempted to return to work, he was told by Cussins what he needed to do in order to be cleared for work. By letters dated March 9 and March 15, 2000, the Postal Service reiterated to Mr. Harrell his return-to-work obligations and told him that he would be subject to removal if he failed to comply with those conditions. Then, when Mr. Harrell responded by letter on March 21, the Postal Service sent him another letter requesting an opportunity to review medical documentation from his health care provider and scheduling an appointment for him to be examined by a USPS-contract physician. Mr. Harrell again refused this request. The Postal Service did not terminate his employment until April 27, 2000.

This chronology demonstrates that Mr. Harrell had ample notice of the Postal Service's expectations and of his obligations related to returning to work. We conclude that, on this record, the district court's grant of summary judgment in favor of the Postal Service was appropriate on this claim.

Conclusion

Accordingly, for the foregoing reasons, we affirm the judgment of the district court insofar as it holds that the doctrine of collateral estoppel is inapplicable to this claim. We also affirm the court's judgment insofar as it determined that the provisions of the postal handbooks and manuals affecting employees' return to work after leave are incorporated into the National Agreement. We also affirm the court's judgment insofar as it holds that Mr. Harrell cannot recover damages on the ground that the USPS contacted his health care provider because he has not been able to show that he was harmed by the unauthorized contact. We further affirm the judgment of the district court insofar as it concluded that Mr. Harrell was notified adequately of the USPS' requirements for returning to work. We reverse the district court's judgment insofar as it held that the USPS' return-to-work regulations may impose a greater burden on the employee than those imposed by the FMLA and its regulations. The parties shall bear their own costs in this court.

AFFIRMED in part; REVERSED and REMANDED in part

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: July 19, 2005

BEFORE: Honorable JOEL M. FLAUM, Chief Judge

Honorable KENNETH F. RIPPLE, Circuit Judge

Honorable ANN CLAIRE WILLIAMS, Circuit Judge

No. 03-4204

RODNEY HARRELL,

Plaintiff-Appellant

v.

UNITED STATES POSTAL SERVICE,

Defendant-Appellee

Appeal from the United States District Court for the Central District of Illinois
No. 02 C 2056, Michael P. McCuskey, Chief Judge

The judgment of the District Court is AFFIRMED and REVERSED; the parties shall bear their own costs in this court. The above is in accordance with the decision of this court entered on this date.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 1, 2005

By the Court:

No. 03-4204

RODNEY HARRELL,
Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,
Defendant-Appellee.

Appeal from the United States District Court for the Central District of Illinois.

No. 02 C 2056

Michael P. McCuskey,
Chief Judge.

ORDER

The petition for rehearing is granted. The opinion of the panel is vacated, and the case is restored to the oral argument calendar.

This case shall be set for re-argument in due course at a time convenient to the court. The Secretary of Labor is invited to participate in the oral argument as amicus curiae.

The parties and the Secretary of Labor are directed to file memoranda not to exceed 20 pages in length addressing whether the Department of Labor regulations are sufficiently specific to warrant judicial deference under Cheveron, U.S.A., Inc. a Natural Resources Defense Council, 467 U.S. 837 (1984). These memoranda must be filed within 30 days of this order.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: May 4, 2006

BEFORE: Honorable JOEL M. FLAUM, Chief Judge

Honorable KENNETH F. RIPPLE, Circuit Judge

Honorable ANN CLAIRE WILLIAMS, Circuit Judge

No. 03-4204

RODNEY HARRELL,
Plaintiff-Appellant

v.

UNITED STATES POSTAL SERVICE,
Defendant-Appellee

Appeal from the United States District Court for the Central District of Illinois
No. 02 C 2056, Michael P. McCuskey, Chief Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

RODNEY HARRELL,	)	
Plaintiff,	)	
v.	)	**No. 02-2056**
UNITED STATES POSTAL SERVICE,	)	
Defendant.	)	

ORDER

(Filed Jul. 25, 2003)

Rodney Harrell initiated this lawsuit against his former employer, the United States Postal Service (USPS), after he was terminated for failing to comply with the USPS's requirements concerning leave covered by the Family Medical Leave Act (FMLA). Both parties have filed motions for summary judgment, and for the reasons discussed below, Harrell's motion is denied and the USPS's motion is granted in part and denied in part.

BACKGROUND

Harrell began working as a clerk for the Decatur Post Office in February 1984, but the facts of his case began on February 2, 2000, when Harrell felt ill and left work early. He was unable to return to work for almost five weeks due to "extreme fatigue, sleep disturbance, stress, and difficulty concentrating." Twice during the month of February,

Harrell submitted to the USPS a certification explaining his absence and requesting that it be treated a FMLA leave. The USPS accepted Harrell's certification and designated his entire absence as FMLA-covered. The second certification from Harrell included a notation written by his doctor that his estimated return-to-work date was March 6, 2000.

Recognizing that Harrell would likely be gone for over three weeks, Jane Cussins, a supervisor with the Decatur USPS, mailed to Harrell a form letter signed by the Postmaster informing Harrell of the return-to-work requirements for FMLA absences that exceed 21 days. Although Harrell did not receive the letter from Cussins outlining the return-to-work requirements until March 7, Cussins and Harrell discussed the USPS mandates when he arrived at the postal facility on March 6 to resume working. For FMLA absences exceeding 21 days, USPS employees must be cleared to return to work either after an appointment with the USPS's contract doctor or after the USPS's Occupational Health Nurse Administrator (OHNA) reviews documentation provided by the employee's personal physician. According to Cussins's deposition testimony, most employees simply visit the contract doctor because the OHNA is quite busy and sometimes difficult to reach. And so, with Harrell in her office waiting to return to work, Cussins called the contract doctor and made Harrell an appointment for later that morning.

Harrell went to the doctor's office, but refused to sign the release form consenting to an examination. According to Harrell's deposition testimony, he felt he would be waiving his rights under the FMLA if he consented because he believed that the law did not require him to submit to the doctor's examination. Instead Harrell

believed that the second FMLA certification he submitted, signed his physician with an estimated March 6 return-to-work date, satisfied the FMLA's requirements. When Harrell returned to Cussins's office, she told him that she would fax to the OHNA this second certification for review so that he could be cleared to return to work.

Upon reviewing the document Harrell provided, the OHNA determined that she lacked sufficient information to clear him, for returning to work. She asserted that she was unable to read Harrell's physician's name and that the form lacked any information about continuing medications, restrictions on his work, or when he was declared fit enough to return. On March 10, she called Harrell to obtain his doctor's name and phone number, but Harrell refused to provide it to her and specifically told her that he did not consent to her contacting his doctor. Two weeks later, however, the OHNA faxed to Harrell's doctor's office the simple return-to-work forms that would permit Harrell to resume working, but the doctor's office eventually told her that they would not fill out those forms without Harrell's consent.

Meanwhile, the Postmaster mailed Harrell a letter dated March 9, reminding him of the USPS's return-to-work requirements and allowing him five days to submit the appropriate documentation or else his absence from work would be deemed without leave. This letter was sent to Harrell via both regular and certified mail. On March 15, after no contact from Harrell, the USPS mailed him another letter (again via regular and certified mail) declaring him Absent Without Leave (AWOL) and scheduling a predisciplinary meeting for March 17 to discuss the situation. This letter provided that "[f]ailure to appear for this meeting could result in disciplinary action up to and

including removal." Hearing nothing from Harrell, the USPS sent him a Notice of Removal, dated March 21, indicating that he would be removed from the Postal Service for being AWOL.

According to Harrell, however, he did not receive either of the two warning letters until March 20. Neither the March 9 letter nor the March 15 letter, both sent by regular and certified mail, were returned to the USPS as being improperly addressed, but Harrell did not sign for the certified letters until March 20. Upon receiving the two warning letters, Harrell drafted a response to the USPS reasserting his belief that he had complied with the FMLA return-to-work requirements and that he was not required to provide any additional document. Harrell also tendered an additional statement from his doctor, deeming him "fit to return to work without restrictions." This statement reached the Postmaster's desk on March 24, three days after he had sent Harrell's Notice of Removal.

The OHNA reviewed the additional handwritten statement from Harrell's doctor, but determined that it still failed to satisfy the return-to-work requirements because it did not include information concerning Harrell's diagnosis, prognosis, or medications. The Postmaster notified Harrell in writing that the note front his doctor was inadequate to allow him to return to work. Additionally, the USPS scheduled another appointment for Harrell to see the contract doctor, but again Harrell refused to consent to an examination.

By letter dated April 27, 2000, the USPS terminated Harrell's employment. Harrell filed a grievance that is currently stayed at the request of Harrell's union pending resolution of this case. In March 2002, Harrell initiated

this lawsuit, asserting that the USPS violated the FMLA in five ways: (1) failing to restore Harrell after he was medically cleared to resume his duties; (2) requiring a medical examination by the contract doctor; (3) contacting his personal physician without his consent; (4) terminating Harrell's employment because of his FMLA leave; and (5) failing to provide him with notice of the USPS's return-to-work requirements and the consequences for failing to comply with those expectations. Both parties have filed motions for summary judgment, each claiming a legal entitlement to judgment based on the undisputed facts, although Harrell's motion is for partial summary judgment and does not address the issues of notice or of contacting his doctor without his permission.

ANALYSIS

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In evaluating a summary judgment motion, the court focuses on whether any material dispute of fact exists that would require a trial. *Winter v. Minn, Mut. Life Ins. Co.*, 199 F.3d 399, 408 (7th Cir. 1999). In making this determination, the court construes all facts and draws all reasonable inferences in favor of the nonmoving party. *King v. Preferred Technical Group*, 166 F.3d 887, 890 (7th Cir. 1999). Because the purpose of summary judgment is to isolate and dispose of factually unsupported claims, however, the nonmoving patty must respond to the motion with evidence setting forth specific facts showing that

there is a genuine issue for trial. *Michael v. St. Joseph County*, 259 F.3d 842, 845 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 2328 (2002).

A. Return-to-Work Requirements

The FMLA requires that employees who takes leave under the act be restored to their previous position, or an equivalent position. 29 U.S.C. § 2614(a)(1). Employers are given the option, however, of adopting a uniform policy requiring employees to tender a certificate from their doctor indicating that the employee is able to resume work, provided that "nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees." 29 U.S.C. § 2614(a)(4). Regulations issued by the Department of Labor to carry out the FMLA, *see Haefling v. United Parcel Serv., Inc.*, 169 F.3d 494, 498 (7th Cir. 1999), further explain that such fitness-for-duty certification need only be a "simple statement of an employee's ability to return to work," but that if any state law, local law, or collective bargaining agreement governs an employee's return to work, those provisions shall be applied. 29 C.F.R. § 825.310(b)-(c).

The USPS requires employees who take more than 21 days of FMLA leave to be certified by either a contract doctor or the OHNA prior to returning to work. And the USPS argues that those certification requirements are permitted under § 2614(a)(4). Harrell, in contrast, asserts that he needed to provide only a simple statement of his ability to return to work, as noted in the Department of Labor regulations. *See* 29 C.F.R. § 825.310(c).

The USPS's legal argument goes something like this: Department of Labor Regulations provide that if a collective bargaining agreement addresses return-to-work requirements, that agreement applies, *see* 29 C.F.R. § 825.310(b); Article 19 of the collective bargaining agreement between the USPS and the American Postal Workers Union (APWU) incorporates by reference "all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions"; § 865 of the Employee and Labor Relations Manual (ELM) details the return-to-work requirements (medical documentation review by OHNA or contract doctor) for employees who take more than 21 days of FMLA leave. Thus, argues the USPS, its requirements are sanctioned by the FMLA and do not violate Harrell's statutory rights.

1. Collateral Estoppel

Harrell first argues that the USPS is precluded from raising this argument because it made the same argument in an earlier lawsuit and was unsuccessful. *See Routes v. Henderson*, 58 F. Supp. 2d 959 (S.D. Ind. 1999). Collateral estoppel (also known as issue preclusion) prohibits the litigation of an issue previously decided by a court of competent jurisdiction. *Montana v. United States*, 440 U.S. 147, 153 (1979). For collateral estoppel to apply, (1) the issue sought to be precluded must be the same as that involved in a prior action; (2) the issue must have been actually litigated; (3) the determination of the issue must have been essential to the final judgment; and (4) the party against whom estoppel is invoked must have been represented in the prior action. *Adair v. Sherman*, 230 F.3d 890, 893 (7th Cir. 2000).

Because Harrell, the plaintiff, is asserting estoppel and because he was not a party to the prior case on which he relies, this circumstance represents offensive non-mutual collateral estoppel. *Chicago Truck Drivers, Helpers & Warehouse Union (Indep.) Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 530 n.3 (7th Cir. 1997). This type of collateral estoppel applies in federal courts, *see, e.g., Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979); *In re Cook*, 49 F.3d 263, 266 (7th Cir. 1995), but, it cannot be asserted against the United States, *United States v. Mendoza*, 464 U.S. 154, 162 (1984); *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 364 (7th Cir. 1987). *But see Adkins v. Comm'r of Internal Revenue*, 875 F.2d 137, 141 (7th Cir. 1989) (questioning whether estoppel may apply against the government with respect to "specific fact determinations, not embracing policy choices and legal issues"). Accordingly, Harrell's collateral estoppel argument fails.

2. Incorporation

Harrell than questions whether the USPS handbooks and manuals are incorporated into the agreement with the union. He asserts that the language of Article 19 of the union agreement merely notes that the handbooks will remain in effect and not that they are incorporated into the agreement. Moreover, he includes a declaration from Greg Bell, who is the Director of Industrial Relations for the APWU, and who maintains that the handbooks and manuals are unilaterally promulgated by the USPS and are not collectively bargained. Bell asserts that there was no bargained agreement about the content of the handbooks and manuals and that, although they can be used as a reference, not the collective bargaining agreement.

The relevant portion of Article 19 of the agreement mandates that "[t]hose parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions" may not contradict the agreement and "shall be continued in effect." Article 19 also provides that the USPS may make changes in those documents that are consistent with the agreement, but the union must receive notice of any proposed changes and have an opportunity to request a meeting or even arbitration concerning the proposed changes.

Although the union agreement does not use the term "incorporate," it appears that the USPS handbooks and manuals are in fact incorporated by reference. *See, e.g. Woodman v. Runyon*, 132 F.3d 1330, 1334 (10th Cir. 1997); *Kroll v. United States*, 58 F.3d 1087, 1091 (6th Cir. 1995); *United States Postal Serv. v. Am. Postal Workers Union*, 922 F.2d 256, 259 & n.2 (5th Cir. 1991). It is true that the handbooks and manuals are unilaterally created by the USPS, but the union agreement does say that the handbooks and manuals remain in effect and that any changes therein must first be presented to the union. This conclusion is not inconsistent with Bell's declaration because he merely reiterates that the contents of the handbooks and manuals were not drafted as part of a bargained agreement and that the handbooks and manuals themselves are not the collective bargaining agreement. Even taking Bell's statements as true, the language of the agreement can be read to incorporate by reference the provisions in the USPS handbooks and manuals.

3. Valid Waiver of Rights

Harrell next argues, relying on the *Routes* decision from the Southern District of Indiana, that the union agreement could not waive the substantive rights of its members. He asserts that any abrogation of substantive FMLA rights by the agreement must be clear and explicit. Contrary to Harrell's claim, however, it does not appear that the union's agreement or the USPS handbooks and manuals are infringing or waiving any of Harrell's substantive rights. USPS employees always have the right guaranteed by the FMLA to be restored to their employment following FMLA leave. The agreement and the USPS regulations merely alter the procedure by which employees go about being restored.

It is possible to imagine a situation in which altering the procedure attached to a certain substantive right would in essence impinge on or prohibit the exercise of that right. This case does not present such a situation, however, given the modest and seemingly simple certification process the USPS imposes for employees who exceed 21 days of FMLA leave. Cussins was able to make Harrell an appointment with the contract doctor on the very morning he sought to return to work. Alternatively, the OHNA needed only two single-sided forms filled out by a doctor, noting Harrell's condition, treatment, medication, and work restrictions. Neither process is so onerous that it effectively abrogates Harrell's right of restoration under the FMLA.

Accordingly, the lack of explicit waiver language in the collective bargaining agreement is not fatal to the USPS's position.

4. Certification Requirements

Harrell argues that the USPS failed to abide by its own regulations by requiring a visit to the contract doctor or clearance by the OHNA. Harrell maintains that the sections of the handbooks cited by the USPS do not refer specifically to FMLA leave and that those portions do not apply to FMLA leave because a different section of the handbooks discusses FMLA leave. He also claims that the specific certification requirements the USPS sought to impose are not actually listed in their handbooks and manuals.

Section 865 of the ELM 15, which was drafted to mirror § 642 of the USPS Handbook EL-311, requires employees returning to work after 21 days or more of absence due to illness or injury to submit "medical documentation of their ability to return to work, with or without limitations. The occupational health nurse administrator or postal physician evaluates the medical report. . . ." Additionally, "[a]ll medical certifications most be detailed medical documentation and not simply a statement of ability to return to work. There must be sufficient information to make a determination that the employee can return to work without hazard to self or others." Nothing in this text forbids the contract doctor or the OHNA from seeking the information they sought from Harrell. "[D]etailed medical documentation" can reasonably include information concerning an employee's illness, diagnosis, treatment, and current medications in order for the contract doctor or OHNA to made [sic] a determination that the employee can safely return to work.

And although Harrell is correct that another section of the ELM 15 specifically addresses FMLA leave, setting

forth definitions and statutory requirements, nothing in that section or in § 865 precludes the application of § 865 to FMLA leave. Both provisions can operate simultaneously without being internally inconsistent.

Given this court's determinations that the USPS return-to-work requirements do not contravene the FMLA or impinge upon Harrell's substantive rights and that the USPS acted in accordance with its own requirements, the USPS is entitled to summary judgment on these claims.

B. Notice Requirements

Harrell also contends that the USPS neglected to provide him sufficient notice of the requirements for returning to work and the consequences of failing to comply with those requirements. This complaint, however, is belied by his deposition testimony in which he admits that he was aware of the USPS regulations concerning returning to work following an absence of more than 21 days. Moreover, upon realizing that Harrell's leave would exceed 21 days, Cussins mailed to him a letter outlining in great detail the return-to-work certification requirements. *See* 29 C.F.R. § 825.301(c). Additionally, when Harrell met with Cussins on March 6, they discussed his alternatives at that time. Accordingly, the USPS provided adequate notice to Harrell, and it is entitled to judgment on this claim.

C. Contacting Physicians

Harrell's complaint also suggests that the USPS acted improperly when the OHNA contacted Harrell's personal physician without his permission. Section 825.310 of the Department of Labor regulations, which discusses a

return-to-work certification, notes that "[a] health care provider employed by the employer may contact the employee's health care provider *with the employee's permission*, for purposes of clarification of the employee's fitness to return to work." 29 C.F.R. § 825.310(c) (emphasis added).

The USPS argues that since a collective bargaining agreement addresses return-to-work requirements (via the employee handbooks and manuals), none of the FMLA provisions concerning return-to-work requirements apply, including the regulation that prohibits contacting doctors without permission. That contention is not supported by any case law in the USPS's memoranda or by the language of the FMLA. The statute mandates that terms of a collective bargaining agreement that govern an employee's return to work shall be applied, but the statute does not say that such terms shall be exclusively applied or that a collective bargaining agreement nullifies all of the terms of the FMLA. *See* 29 C.F.R. § 825.310(b). Moreover, nothing in the union agreement entitles the USPS to contact an employer's doctor without permission.

The USPS also asserts that any FMLA violation was harmless error because the OHNA never spoke directly to Harrell's doctor and because the doctor's office informed her that they would not provide any information without Harrell's consent. Accordingly, the USPS argues, Harrell suffered no ill-effects, and his return-to-work status was not compromised by the OHNA's contact with his doctor's office. This contention is again not supported by any case law. The USPS identifies no legal authority for its application of the harmless error analysis to an FMLA violation. Accordingly, it is not entitled to summary judgment on this claim.

D. Jury Trial Demand and Compensatory Damages

The USPS requested that Harrell's demand for a jury trial be denied and that his request for damages be limited. This court will hear oral argument on these issues at the final pretrial conference.

CONCLUSION

IT IS THEREFORE ORDERED:

(1) Plaintiff's Motion for Partial Summary Judgment (#26) is DENIED.

(2) Defendant's Motion for Summary Judgment (#22) is GRANTED in part and DENIED in part. Judgment is entered in favor of Defendant and against Plaintiff on all claims *except* the claim relating to Defendant's contact of Plaintiff's physician without his consent.

(3) This case remains set for a final pretrial conference on August 6, 2003, at 9:30 a.m., at which time this court will hear oral argument on the jury demand and on available damages. Additionally, this case remains set for trial, whether bench or jury, on August 18, 2003, at 8:30 a.m.

ENTERED this 25th day of July, 2003.

/s/ Michael P. McCuskey
MICHAEL P. McCUSKEY
U.S. DISTRICT JUDGE

CHAPTER 28 - FAMILY AND MEDICAL LEAVE

29 U.S.C. § 2613. Certification

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification

Certification provided under subsection (a) of this section shall be sufficient if it states –

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) Limitation

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

(2) Finality

The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

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29 U.S.C. § 2614. Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave –

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to –

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction

Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration

An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if –

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage

Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave

The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if –

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than –

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by –

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title; or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee

The certification described in subparagraph (A)(ii) shall be sufficient if the certification states

that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member

The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

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29 U.S.C. § 2651. Effect on other laws

(a) Federal and State antidiscrimination laws

Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

(b) State and local laws

Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.

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29 U.S.C. § 2652. Effect on existing employment benefits

(a) More protective

Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) Less protective

The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

PART 825 – THE FAMILY AND MEDICAL LEAVE ACT OF 1993

Subpart A – What is the Family and Medical Leave Act, and to Whom Does It Apply?

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29 C.F.R. § 825.101 What is the purpose of the Act?

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The enactment of FMLA was predicated on two fundamental concerns – the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment,

and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

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29 C.F.R. § 825.214 What are an employee's rights on returning to work from FMLA leave?

(a) On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* § 825.106(e) for the obligations of joint employers.

(b) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to

another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act (ADA). *See* § 825.702.

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29 C.F.R. § 825.215 What is an equivalent position?

(a) An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, *etc.*, as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) *Equivalent Pay.* (1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employer's policy or practice to do so with respect to other employees on "leave without pay." In such case, any pay increase would be granted based on the employee's seniority, length of service, work performed, etc., excluding the period of unpaid FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten

hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Many employers pay bonuses in different forms to employees for job-related performance such as for perfect attendance, safety (absence of injuries or accidents on the job) and exceeding production goals. Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave had met all the requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee may not be disqualified for the bonus(es) for the taking of FMLA leave. *See* § 825.220 (b) and (c). A monthly production bonus, on the other hand does require performance by the employee. If the employee is on FMLA leave during any part of the period for which the bonus is computed, the employee is entitled to the same consideration for the bonus as other employees on paid or unpaid leave (as appropriate). *See* paragraph (d)(2) of this section.

(d) *Equivalent Benefits.* "Benefits" include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. *See* § 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (*e.g.*, paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances

of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

(e) *Equivalent Terms and Conditions of Employment.* An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (*i.e.*, one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

(f) The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis or intangible, unmeasurable aspects of the job. However, restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

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29 C.F.R. § 825.216 Are there any limitations on an employer's obligation to reinstate an employee?

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(b) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a

contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. *See* § 825.107.

(c) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees ("key employees," as defined in paragraph (c) of § 825.217) if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness for duty certificate to return to work under the conditions described in § 825.310.

(d) If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA for any relief or protections.

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29 C.F.R. § 825.220 How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has –

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) changing the essential functions of the job in order to preclude the taking of leave;

(3) reducing hours available to work in order to avoid employee eligibility.

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (*see* § 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

(e) Individuals, and not merely employees, are protected from retaliation for opposing (*e.g.*, file a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

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29 C.F.R. § 825.310 Under what circumstances may an employer require that an employee submit a medical certification that the employee is able (or unable) to return to work (*i.e.*, a "fitness-for-duty" report)?

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition

that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

(d) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(e) The notice that employers are required to give to each employee giving notice of the need for FMLA leave regarding their FMLA rights and obligations (see § 825.301) shall advise the employee if the employer will require fitness-for-duty certification to return to work. If the employer has a handbook explaining employment policies and benefits, the handbook should explain the employer's general policy regarding any requirement for fitness-for-duty certification to return to work. Specific notice shall also be given to any employee from whom fitness-for-duty certification will be required either at the time notice of the need for leave is given or immediately after leave commences and the employer is advised of the medical circumstances requiring the leave, unless the employee's condition changes from one that did not previously require certification pursuant to the employer's practice or policy. No second or third fitness-for-duty certification may be required.

(f) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notices required in paragraph (e) of this section.

(g) An employer is not entitled to certification of fitness to return to duty when the employee takes intermittent leave as described in § 825.203.

(h) When an employee is unable to return to work after FMLA leave because of the continuation, recurrence, or onset of the employee's or family member's serious health condition, thereby preventing the employer from recovering its share of health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition. (See § 825.213(a)(3).) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

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29 C.F.R. § 825.311 What happens if an employee fails to satisfy the medical certification and/or recertification requirements?

(a) In the case of foreseeable leave, an employer may delay the taking of FMLA leave to an employee who fails to provide timely certification after being requested by the employer to furnish such certification (i.e., within 15 calendar days, if practicable), until the required certification is provided.

(b) When the need for leave is not foreseeable, or in the case of recertification, an employee must provide

certification (or recertification) within the time frame requested by the employer (which must allow at least 15 days after the employer's request) *or* as soon as reasonably possible under the particular facts and circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employer may delay the employee's continuation of FMLA leave. If the employee never produces the certification, the leave is not FMLA leave.

(c) When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (see § 825.310(a)) if the employer has provided the required notice (see § 825.301(c); the employer may delay restoration until the certification is provided. In this situation, unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. See also § 825.213(a)(3).

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29 C.F.R. § 825.312 Under what circumstances may a covered employer refuse to provide FMLA leave or reinstatement to eligible employees?

(a) If an employee fails to give timely advance notice when the need for FMLA leave is foreseeable, the employer

may delay the taking of FMLA leave until 30 days after the date the employee provides notice to the employer of the need for FMLA leave. (See § 825.302.)

(b) If an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, an employer may delay continuation of FMLA leave until an employee submits the certificate. (See §§ 825.305 and 825.311.) If the employee never produces the certification, the leave is not FMLA leave.

(c) If an employee fails to provide a requested fitness-for-duty certification to return to work, an employer may delay restoration until the employee submits the certificate. (See §§ 825.310 and 825.311.)

(d) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. Thus, an employee's rights to continued leave, maintenance of health benefits, and restoration cease under FMLA if and when the employment relationship terminates (*e.g.*, layoff), unless that relationship continues, for example, by the employee remaining on *paid* FMLA leave. If the employee is recalled or otherwise re-employed, an eligible employee is immediately entitled to further FMLA leave for an FMLA-qualifying reason. An employer must be able to show, when an employee requests restoration, that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment. (See § 825.216.)

(e) An employer may require an employee on FMLA leave to report periodically on the employee's status and

intention to return to work. (See § 825.309.) If an employee unequivocally advises the employer either before or during the taking of leave that the employee does not intend to return to work, and the employment relationship is terminated, the employee's entitlement to continued leave, maintenance of health benefits, and restoration ceases unless the employment relationship continues, for example, by the employee remaining on *paid* leave. An employee may not be required to take more leave than necessary to address the circumstances for which leave was taken. If the employee is able to return to work earlier than anticipated, the employee shall provide the employer two business days notice where feasible; the employer is required to restore the employee once such notice is given, or where such prior notice was not feasible.

(f) An employer may deny restoration to employment, but not the taking of FMLA leave and the maintenance of health benefits, to an eligible employee only under the terms of the "key employee" exemption. Denial of reinstatement must be necessary to prevent "substantial and grievous economic injury" to the employer's operations. The employer must notify the employee of the employee's status as a "key employee" and of the employer's intent to deny reinstatement on that basis when the employer makes these determinations. If leave has started, the employee must be given a reasonable opportunity to return to work after being so notified. (See § 825.219.)

(g) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions.

(h) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (g) of this section.

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29 C.F.R. § 825.700 What if an employer provides more generous benefits than required by FMLA?

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (*e.g.*, provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA. If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the

Act is intended to discourage employers from adopting or retaining more generous leave policies.

(c)(1) The Act does not apply to employees under a collective bargaining agreement (CBA) in effect on August 5, 1993, until February 5, 1994, or the date the agreement terminates (*i.e.*, its expiration date), whichever is earlier. Thus, if the CBA contains family or medical leave benefits, whether greater or less than those under the Act, such benefits are not disturbed until the Act's provisions begin to apply to employees under that agreement. A CBA which provides no family or medical leave rights also continues in effect. For CBAs subject to the Railway Labor Act and other CBAs which do not have an expiration date for the general terms, but which may be reopened at specified times, *e.g.*, to amend wages and benefits, the first time the agreement is amended after August 5, 1993, shall be considered the termination date of the CBA, and the effective date for FMLA.

(2) As discussed in § 825.102(b), the period prior to the Act's delayed effective date must be considered in determining employer coverage and employee eligibility for FMLA leave.

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29 C.F.R. § 825.701 Do State laws providing family and medical leave still apply?

(a) Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA. The Department of Labor will not, however, enforce State family or medical leave laws, and States may not enforce the FMLA. Employees are not required to designate whether the leave

they are taking is FMLA leave or leave under State law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws. Examples of the interaction between FMLA and State laws include:

(1) If State law provides 16 weeks of leave entitlement over two years, an employee would be entitled to take 16 weeks one year under State law and 12 weeks the next year under FMLA. Health benefits maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year.

(2) If State law provides half-pay for employees temporarily disabled because of pregnancy for six weeks, the employee would be entitled to an additional six weeks of unpaid FMLA leave (or accrued paid leave).

(3) A shorter notice period under State law must be allowed by the employer unless an employer has already provided, or the employee is requesting, more leave than required under State law.

(4) If State law provides for only one medical certification, no additional certifications may be required by the employer unless the employer has already provided, or the

employee is requesting, more leave than required under State law.

(5) If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a "spouse equivalent," and leave was used for that purpose, the employee is still entitled to 12 weeks of FMLA leave, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or "spouse equivalent."

(6) If State law prohibits mandatory leave beyond the actual period of pregnancy disability, an instructional employee of an educational agency subject to special FMLA rules may not be required to remain on leave until the end of the academic term, as permitted by FMLA under certain circumstances. (See Subpart F of this part.)

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29 C.F.R. § 825.702 How does FMLA affect Federal and State anti-discrimination laws?

(a) Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act). FMLA's legislative history explains that FMLA is "not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990, or the regulations issued

under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA], employers who receive Federal financial assistance, employers who contract with the Federal government, or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection." S.Rep. No. 3, 103d Cong., 1st Sess. 38 (1993). An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired (*Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978))).

(b) If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), the employer must make reasonable accommodations, *etc.*, barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her FMLA rights. ADA's "disability" and FMLA's "serious health condition" are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would

have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an "eligible employee" entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties

from also treating the leave as a reasonable accommodation and reinstating the employee into the *same* job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the employee would be shielded from FMLA's provision for temporary assignment to a different alternative position. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employer to part-time employees.

(4) At the end of the FMLA leave entitlement, an employer is required under FMLA to reinstate the employee

in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employer's FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employer to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, *require* an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. See § 825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a "light duty" position. If the employer offers such a position, the employee is permitted but not required to accept the position (*see* § 825.220(d)). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the

employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. See § 825.207(d)(2). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

(e) If an employer requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, an employer should provide the same benefits for women who are pregnant as the employer provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employer (and, therefore, not an "eligible" employee under FMLA) may *not* be denied maternity leave if the employer normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) For further information on Federal antidiscrimination laws, including Title VII and the ADA, individuals are encouraged to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

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No. 06-192

In the Supreme Court of the United States

RODNEY HARRELL, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, provides that its provision governing certification of an employee's medical ability to return to work after a medical leave does not "supersede * * * a collective bargaining agreement that governs the return to work of such employees." 29 U.S.C. 2614(a)(4). Implementing FMLA, the Department of Labor promulgated a regulation stating that if a collective bargaining agreement contains provisions governing an employee's return to work, "those provisions shall be applied." 29 C.F.R. 825.310(b). This case presents the following question:

Whether an employer may rely upon return-to-work certification provisions incorporated into a valid collective bargaining agreement to impose return-to-work certification requirements on employees that are more stringent than those set forth in the statute.

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OPINIONS BELOW

The opinion of the court of appeals (after rehearing) (Pet. App. 1-34) is reported at 445 F.3d 913. The original opinion of the court of appeals (Pet. App. 35-65) is reported at 415 F.3d 700. The opinion of the district court (Pet. App. 69-82) is reported at 331 F. Supp. 2d 76.

JURISDICTION

The judgment of the court of appeals (Pet. App. 68) was entered on May 4, 2006. The petition for a writ of certiorari was filed on August 2, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title I of the Family and Medical Leave Act of 1993 (FMLA) provides that an "eligible employee" may receive a total of "12 workweeks of leave during any 12-

month period" for certain purposes, including as a result of "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. 2612(a)(1)(D).[1] Generally, an employee who takes such FMLA leave must, upon return from such leave, be restored to the same or an equivalent position. 29 U.S.C. 2614(a)(1).[2] As a condition of restoration, however,

> the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

29 U.S.C. 2614(a)(4).

The Department of Labor (DOL) has authority to "prescribe such regulations as are necessary to carry

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[1] Title I of FMLA, 29 U.S.C. 2611-2619 (2000 & Supp. III 2003), applies to private sector employees and certain federal workers, including those employed by the United States Postal Service. See 29 C.F.R. 825.109(b)(1). Most federal employees are subject to Title II of FMLA, 5 U.S.C. 6381-6387 (2000 & Supp. IV 2004), which contains similar provisions but authorizes only administrative remedies. See 29 U.S.C. 6383.

[2] 29 U.S.C. 2614(a)(1) provides that, with an exception not relevant here,

> any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave
>
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
>
> (B) to be restored to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

out" Title I. 29 U.S.C. 2654. In that capacity, DOL has promulgated regulations that make clear that an employer ordinarily can require "certification from the employee's health care provider that the employee is able to resume work." 29 C.F.R. 825.310(a). Generally, the "certification itself need only be a simple statement of an employee's ability to return to work." 29 C.F.R. 825.310(c). However, "[i]f State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied." 29 C.F.R. 825.310(b).

2. Petitioner worked as a clerk in the Decatur, Illinois post office from 1984 to 2000. Pet. App. 2-5. He was represented for collective bargaining purposes by the American Postal Workers Union (APWU). *Id.* at 2. Article 19 of the collective bargaining agreement between the union and the United States Postal Service (Postal Service) states that "[t]hose parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions" may not contradict the agreement and "shall be continued in effect." *Id.* at 17. Article 19 also provides that the Postal Service may make changes in those documents that are consistent with the agreement, but the union must receive notice of any proposed changes and have an opportunity to request a meeting or arbitration over the proposed changes. *Id.* at 77.

Postal regulations require employees returning to work from certain absences exceeding 21 days to provide "sufficient information to make a determination that the employee can return to work without hazard to self or others." Pet. App. 79. The regulations require that such medical certifications must "be detailed medical documentation and not simply a statement of ability

to return to work." *Ibid.* In particular, the employee must be cleared to return to work by the Postal Service's contract doctor or by its Occupational Health Nurse Administrator after a review of documentation provided by the employee's personal physician. *Id.* at 70, 74, 79.

In February 2000, petitioner took medical leave as a result of fatigue, sleep disturbance, and stress. Pet. App. 2. His doctor prescribed him medication for depression during this time. C.A. App. 33, 659. The Postal Service subsequently granted petitioner's request for 2-4 weeks of FMLA leave. Pet. App. 70. In late February petitioner submitted a form completed by his physician estimating that petitioner could return to work on March 6, 2000. *Id.* at 2. An official with the Postal Service sent petitioner a letter informing him that he must submit more detailed information, specifically, "medical documentation outlining the nature and treatment of the illness" and the medicine he had been taking, for review by the Postal Medical Officer. *Id.* at 2-3.

Petitioner arrived for work on March 6, 2000, without any additional documents, claiming he had not received the letter. The post office supervisor responsible for monitoring employees' use of FMLA leave informed petitioner that he would be required to provide more information to be cleared to return to work, and could do so either by obtaining the required information from his physician, or being examined by a Postal Service contract physician that day. Pet. App. 3, 70. Petitioner refused to consent to an examination and continued to refuse to provide the additional information sought by the Postal Service. *Id.* at 3, 5. In light of petitioner's continued refusal to provide the information, the Postal Service terminated his employment. *Id.* at 5.

3. Petitioner brought this action, alleging that the Postal Service violated FMLA by, among other things, failing to restore him to his position and terminating his employment. Pet. App. 6. The district court granted summary judgment to the Postal Service. See *ibid.* The district court held that the collective bargaining agreement incorporated the Postal Service regulations requiring the submission of additional medical certification to return to work. *Id.* at 77. The district court then concluded that under FMLA the terms of the collective bargaining agreement control the return-to-work process. In light of the "modest and seemingly simple certification process" mandated by the Postal Service, the court held that petitioner's FMLA rights had not been violated. *Id.* at 78.

4. In its first decision (Pet. App. 35-65), the court of appeals affirmed in part and reversed in part. The panel rejected petitioner's contention that the Postal Service regulations and handbooks governing an employee's return to work were not properly incorporated into the collective bargaining agreement. *Id.* at 51-53. The panel also rejected petitioner's claim that he had not received proper notice of return-to-work procedures. *Id.* at 63-64. The panel held, however, that the Postal Service could not rely upon the collective bargaining agreement to impose more stringent return-to-work certification requirements on employees than those specified in FMLA's certification provision, as implemented by the regulation requiring only a "simple statement of an employee's ability to return to work." 29 C.F.R. 825.310(c); see Pet. App. 53-60.

5. The Postal Service, joined by DOL as amicus curiae, filed a petition for panel rehearing or rehearing en banc. Pet. App. 2. The petition asserted that the panel

had misinterpreted the statute and had invalidated, *sub silentio*, DOL's regulation governing return-to-work certifications without attempting to employ the framework outlined in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

The panel granted the petition for rehearing and, after additional briefing and argument, affirmed the district court's decision. Pet. App. 1-34. The court held that the national collective bargaining agreement between the Postal Service and the APWU incorporated the postal manuals and handbooks containing the applicable return-to-work provisions. *Id.* at 19.

With respect to the question whether an employer can apply a return-to-work certification procedure in a collective bargaining agreement that is more stringent than the general certification specified in FMLA, the court rejected both parties' contentions that the statute is clear on its face. Concluding that Congress had not clearly addressed the precise question at issue, the court turned to the question whether DOL's regulation on the subject is entitled to *Chevron* deference. Pet. App. 24.

The court first rejected petitioner's contention that DOL's regulation is "no more than a restatement of the language of the statute." Pet. App. 24. The court concluded that "the regulation goes beyond the mere recitation of the statutory language and speaks to the issue presented in this case." *Ibid.* The court found that "[n]ot only does subsection (b) [of 29 C.F.R. 825.310] clearly state that a CBA takes precedence over the statutory requirements, the examples that follow illustrate that the Department of Labor does not believe that return-to-work requirements found in a CBA only can provide employees with greater protections than the statutory language." *Id.* at 25-26.

The court then held that the agency's regulation is reasonable and therefore entitled to deference. Pet. App. 26-27. The court also found that DOL's interpretation "avoids a construction of the statute that would render the last clause of § 2614(a)(4) superfluous." *Id.* at 27. That clause provides that nothing in Section 2614(a) "supersede[s] * * * a collective bargaining agreement that governs the return to work of * * * employees." 29 U.S.C. 2614(a)(4). If that clause were construed to apply only when the return-to-work certification permitted under a collective bargaining agreement was less burdensome on the employee than the certification specified in FMLA, it would merely grant the same protections already granted by Section 2652(a), which provides that "[n]othing in this Act * * * shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement * * * that provides greater family or medical leave rights to employees than the rights established under this Act." 29 U.S.C. 2652(a)(4). The court reasoned that the only way to give effect to the last clause of Section 2614(a)(4) is to construe it, as DOL has done, to save collective bargaining agreement provisions that impose more stringent requirements on employees than would Section 2614(a)(4) alone. Pet. App. 27.

In addition, the court concluded that "there is support in the legislative history" for the agency's conclusion, citing to a statement in the Senate Report indicating that state laws or a collective bargaining agreement may, "for reasons of public health," require additional medical certifications. Pet. App. 27.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner notes (Pet. 15) that this case is one of "first impression." Indeed, the petition for certiorari does not cite any decision of any other court of appeals—or, even, any district court. Given the absence of such a conflict, the questions presented do not warrant further review. See Sup. Ct. R. 10(a).

Petitioner contends (Pet. 15-16) that this case is of such extraordinary importance that it warrants review in the absence of a circuit conflict. Petitioner observes that the Postal Service and DOL asserted that the case presented a question of exceptional importance in seeking rehearing of the initial panel opinion in the court of appeals.[3] The Postal Service, however, sought rehearing of a panel ruling that had invalidated an agency regulation, throwing into doubt the validity of numerous collective bargaining agreements and preventing employers from protecting the public health by ensuring that employees who return to work can do so safely. A decision upholding an agency regulation and avoiding a result that invalidates existing collective bargaining agreements merely maintains the status quo, and does not warrant this Court's intervention.

2. The decision of the court of appeals is correct. Section 2614(a)(4) authorizes employers to enforce "a uniformly applied practice or policy that requires each

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[3] Petitioner took the opposite position, arguing that regardless of the outcome of the issue, the case was not sufficiently important to warrant rehearing. See Answer of Plaintiff-Appellant Rodney Harrell to Pet. for Reh'g En Banc 14.

* * * employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede * * * a collective bargaining agreement that governs the return to work of such employees." 29 U.S.C. 2614(a)(4). As an initial matter, the proviso that "nothing in this paragraph shall supersede" a collective bargaining agreement is most naturally read to give effect to provisions in collective bargaining agreements regardless of whether they impose greater or lesser obligations on employees than are specified in Section 2614(a)(4) itself. Accordingly, DOL's regulations, such as 29 C.F.R. 825.310(b), which construe the statute in exactly that way, are at the very least a reasonable construction of the statute and are controlling under *Chevron*. See *United States* v. *Mead*, 533 U.S. 218, 229 (2001) ("[A] reviewing court * * * is obliged to accept the agency's position if * * * the agency's interpretation is reasonable."); *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002).

If there were any doubt that the DOL regulations are at least a reasonable construction of the statute, however, that doubt is put to rest by Section 2652(a) of FMLA. As noted above, see p. 7, *supra*, Section 2652(a) expressly authorizes the application of collective bargaining agreement provisions that are *less* burdensome to employees than the requirements of FMLA itself. In light of the work already done by Section 2652(a), the court of appeals correctly concluded that the only way to give any additional effect to the collective bargaining proviso of Section 2614(a)(4) is to construe it to authorize the application of collective bargaining agreement provisions that are *more* burdensome to employees than the certification requirement authorized in Section

2614(a)(4) itself. For that reason, too, the DOL regulations, which construe Section 2614(a)(4) in precisely that way and therefore give meaning to each provision of the statute, are surely at least a reasonable construction that is entitled to *Chevron* deference.[4] The decision of the court of appeals is accordingly correct.

3. Petitioner argues (Pet. 18-22) that Section 2614(a)(4)'s collective bargaining proviso authorizes the application only of collective bargaining provisions that are less burdensome to employees than the certification procedure set forth in Section 2614(a)(4) itself. He contends (Pet. 20) that his construction would not render the proviso superfluous, because the proviso would still function to block an employer's argument "that the specific return-to-duty provisions of § 2614(a)(4) give employers the right to establish a 'uniform policy' governing return to duty regardless of collective bargaining agreements" that give greater rights to employees.

Petitioner's argument is mistaken, because the function he ascribes to the collective bargaining proviso in Section 2614(a)(4) is precisely the function served by Section 2652(a). Indeed, petitioner acknowledges elsewhere (Pet. 21) that "[i]f an employer were to promulgate a return-to-duty provision more restrictive than a collective bargaining agreement, § 2652(a) would pre-

[4] That conclusion is supported by the legislative history as well. The Senate committee report indicates that the statutory return-to-work provisions were "not meant to supersede other valid State or local laws or collective bargaining agreement[s] that, for reasons such as public health, might affect the medical certification required for the return to work of an employee." S. Rep. No. 3, 103d Cong., 1st Sess. 31 (1993). Thus, "[f]or example, [FMLA] does not supersede a State law that requires specific medical certification before the return to work of employees who have had a particular illness and who have direct contact with the public." *Ibid.*

serve the validity of the agreement." In any event, even if petitioner's argument were correct, it at most would support an argument that, had DOL construed the collective bargaining proviso in Section 2614(a)(4) as petitioner urges, that construction would have been reasonable and entitled to deference. Petitioner's argument does not establish that DOL's decision to construe the statutory collective bargaining proviso differently is unreasonable—the burden that petitioner bears under *Chevron* to overturn DOL's regulation.

Petitioner also argues (Pet. 16-17) that Section 2614(a)(1) gives employees "a right to return to work without having to show medical evidence of their fitness for duty." See note 2, *supra*. He contends (Pet. 17) that the right granted by Section 2614(a)(1) is not disturbed by Section 2614(a)(4), which provides only that "*nothing in this paragraph*" supersedes a collective bargaining agreement. In his view, Section 2614(a)(4) thus merely gives employers a limited right to interfere with the otherwise absolute right granted in Section 2614(a)(1) by establishing a uniformly applied practice or policy requiring medical certification.

Petitioner's initial premise, however, is incorrect. Section 2614(a)(1) does not establish an "unfettered right" (Pet. 16) to return to work without presenting medical evidence of fitness for duty. Indeed, Section 2614(a)(1) does not address the procedural aspects of returning to work at all; it merely states the general rule that employers must allow returning employees to return to the same or an equivalent position. Thus, when Congress provided in Section 2614(a)(4) that "nothing in this paragraph" supersedes collective bargaining agreements or state and local laws, Congress made clear that the specific certification procedure spec-

ified in Section 2614(a)(4) could be overridden by collective bargaining agreements.

4. Petitioner contends (Pet. 23-26) that deference should not be accorded DOL's interpretation of the statute. That contention is incorrect.

First, petitioner errs in stating (Pet. 23) that the regulation does "little more" than paraphrase the statute. As the court of appeals recognized (Pet. App. 24-26), the regulation goes beyond recitation of the statutory language, making clear that a collective bargaining agreement governing certification of fitness for duty controls. 29 C.F.R. 825.310(b).

Petitioner is also incorrect in suggesting that deference is inappropriate because the regulations "do not expressly deal with the question whether a collective bargaining agreement that diminishes statutory rights may be given effect." Pet. 24. In fact, the regulation unambiguously provides that a collective bargaining agreement, like a state or local law, controls regardless of the circumstances. That is, "[i]f a state or local law or the terms of a collective bargaining agreement govern an employee's return to work, *those provisions shall be applied.*" 29 C.F.R. 825.310(b) (emphasis added). Indeed, the same regulatory subsection goes on to provide an example in which a collective bargaining agreement requires more than a mere certification that an employee can return to work: "an employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment." *Ibid.*

Petitioner's attempt (Pet. 24-26) to show that DOL has taken conflicting positions on the issue is based upon

an ABA treatise that misreads a 1995 DOL opinion letter. That 1995 letter did not, as petitioner asserts, state that return-to-work certification requirements in collective bargaining agreements apply only if they do not diminish FMLA protections. Rather, the 1995 opinion points out, consistently with the regulations and the position DOL has taken in this case, that "if the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied as stated in [29 C.F.R. 825.310(b)]." Opinion Letter Regarding Family and Medical Leave Act, FMLA-58 (DOL Apr. 28, 1995), *available at* 1995 WL 1036729.

To be sure, there are subsequent statements in the 1995 letter that caution that a collective bargaining agreement may not diminish employee rights. Those statements, however, occur in a discussion of a *separate* regulation based upon 29 U.S.C. 2652. In that context, the letter states, consistently with 29 U.S.C. 2652(b), that the rights and benefits under FMLA "may not be diminished by any employment benefit program or plan." Opinion Letter, *supra*. The example that follows, however, does not purport to address certification procedures, but instead states: "a collective bargaining agreement which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA." *Ibid.* Thus, at no point did DOL state that certification requirements in a collective bargaining agreement cannot include requirements more stringent than those in the statute. Indeed, in the only opinion letter that directly addresses whether a collective bargaining agreement can impose more stringent return-to-work certification requirements than those set forth in the statute, the

Department of Labor concluded that it could. See Pet. App. 26 n.6.

5. Petitioner also contends (Pet. 26-28) that application of the collective bargaining agreement here amounts to a waiver of statutory rights that must be "clear and unmistakable." That contention overlooks the fact that Section 2614(a)(4) of FMLA itself makes clear that the return-to-work certification procedure it specifies was not meant to supersede collective bargaining agreements. The cases cited by petitioner, all of which involve attempts to waive statutory rights that did *not* contain exceptions for collective bargaining agreements, are not relevant here. See, *e.g.*, *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 709 (1983). This is not a case of waiving a statutory provision, but of applying one.[5]

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[5] Petitioner does not appear to challenge the court of appeals' holding that the Postal Service manuals governing return-to-work certification were incorporated by reference into the collective bargaining agreement (see Pet. 26). In any event, as the court of appeals noted (Pet. App. 17-18), every court of appeals to address the issue has held that Postal Service manuals and handbooks that affect working conditions are incorporated by reference into the national collective bargaining agreement—a position that petitioner's union has supported. See, *e.g.*, *Woodman* v. *Runyon*, 132 F.3d 1330, 1334 (10th Cir. 1997); *Kroll* v. *United States*, 58 F.3d 1087, 1091 (6th Cir. 1995); *USPS* v. *American Postal Workers Union*, 922 F.2d 256, 259 n.2 (5th Cir. 1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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